APPENDIX A

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

[Filed Oct. 22, 2002]

No. 00-1355

EXXONMOBIL GAS MARKETING COMPANY,
a Division of Exxon Mobil Corporation,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ANR PIPELINE COMPANY, *et al.*,
Intervenors.

Consolidated with 00-1357, 00-1361, 00-1363, 00-1364,00-1365

Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON,* RANDOLPH, ROGERS, TATEL, and GARLAND,* Circuit Judges

ORDER

Upon consideration of petitioners Producer Coalition and intervenor IPAA's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

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* Circuit Judges Henderson and Garland did not participate in this matter.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1355, 00-1357, 00-1361, 00-1363 through 00-1365.

EXXONMOBIL GAS MARKETING COMPANY,
a Division of Exxon Mobil Corporation,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ANR PIPELINE COMPANY, et al.,
Intervenors.

Argued Feb. 1, 2002.
Decided Aug. 6, 2002.

Before: GINSBURG, Chief Judge, EDWARDS and SENTELLE, Circuit Judges.

SENTELLE, Circuit Judge:

ExxonMobil Gas Marketing Company, *et al.*,[1] (hereinafter "ExxonMobil") and the Producer Coalition[2] petition for review of Federal Energy Regulatory Commission ("FERC"

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[1] Joining ExxonMobil Gas Marketing Co.'s brief are: Amerada Hess Corp., Amoco Production Co., BP Energy Co., Anadarko Petroleum Corp., Marathon Oil Co., Murphy Exploration and Production Co., Phillips Petroleum Co., and Texaco Natural Gas, Inc.

[2] The Producer Coalition consists of Forest Oil Corp., the Houston Exploration Co., Newfield Exploration Co., Ocean Energy, Inc., Dominion Exploration & Production, Inc., and TotalFinaElf E&P U.S.A., Inc. Intervenor Independent Petroleum Association of America joins the Producer Coalition's brief.

or "the Commission") orders in which FERC reclassified portions of Sea Robin Pipeline Company's pipeline system on the Outer Continental Shelf as non-jurisdictional "gathering" facilities for natural gas, rather than jurisdictional "transportation" facilities, pursuant to section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). FERC argues that in developing and applying its reformulated "primary function" test the Commission followed the suggestion of the United States Court of Appeals for the Fifth Circuit in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir.1997) ("*Sea Robin I*"), and reasonably identified the demarcation point between gathering and transportation in Sea Robin's pipeline system. Because the Commission did not act unreasonably in determining that portions of Sea Robin's system were non-jurisdictional, we deny the petitions for review.

I. Background

A. Statutory and Regulatory Framework

Section 1(b) of the Natural Gas Act ("the Act"), 15 U.S.C. § 717 *et seq.*, governs "the transportation of natural gas in interstate commerce." 15 U.S.C. § 717(b). However, in section 1(b) of the Act Congress prescribed not only "the intended reach of the Commission's power, but also specified the areas into which this power was *not* to extend." *Federal Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 503, 69 S.Ct. 1251, 1255, 93 L.Ed. 1499 (1949) (emphasis added). Section 1(b) expressly exempts from the Commission's jurisdiction "the production or gathering of natural gas." 15 U.S.C. § 717(b). Thus, Congress "carefully divided," *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 510, 109 S.Ct. 1262, 1274, 103 L.Ed.2d 509 (1989), energy regulatory authority and "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act." *Panhandle Eastern*, 337 U.S. at 502-03, 69 S.Ct. at 1255.

The Natural Gas Act does not define either "transportation," which falls within the Commission's jurisdiction, or "gathering," which is exempt from FERC authority under the Act. The Supreme Court has, however, held that "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed." *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 690-91, 67 S.Ct. 1482, 1487, 91 L.Ed. 1742 (1947) (construing 15 U.S.C. § 717(b)). Thus, the Supreme Court has "consistently held that 'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90, 83 S.Ct. 646, 649-50, 9 L.Ed.2d 601 (1963). The Commission's long-held definition of gathering, taken as consistent with the Supreme Court's pronouncements on the Act, is "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957); *see also Conoco Inc. v. FERC*, 90 F.3d 536, 539 n. 2 (D.C.Cir.1996) ("Gathering is the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system.") (citing *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n. 1 (10th Cir.1990)).

Despite these attempts to clarify the Natural Gas Act, this Court has observed that "[t]he line between jurisdictional transportation and nonjurisdictional gathering is not always clear." *Conoco*, 90 F.3d at 542. For many years the Commission employed two principal tests to differentiate transportation from gathering. Developed in the on-shore context, these tests were the "behind-the-plant" test and the "central-point-in-the-field" test. The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are non-jurisdictional gathering lines, while facilities downstream of the processing plant are

presumptively transportation facilities. *See Phillips Petroleum Co.*, 10 F.P.C. 246, 276-78, 1951 WL 1832 (1951), *rev'd on other grounds*, *Wisconsin v. Federal Power Comm'n*, 205 F.2d 706 (D.C.Cir.1953), *aff'd*, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954). For gas that requires no processing the "central-point-in-the-field" test applied, under which lateral lines collecting gas from separate wells that then converge into a single larger line (typically at the point where the gas is compressed for transportation by the pipeline), were classified as gathering facilities. *E.g., Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957). Since 1983, the Commission has subsumed these two tests into its "primary function" test to determine "whether a facility is devoted to the collection of gas from wells—gathering—or to the further ('downstream') long-distance movement of gas after it has been collected—interstate transportation." *Conoco*, 90 F.3d at 543 (citing *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,143, 1983 WL 39391 (1983); *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,987-88, 1990 WL 1241336 (1990)).

The "primary function" test generally employs the following six physical criteria: (1) the length and diameters of the lines; (2) the extension of the facility beyond the central point in the field; (3) the geographic configuration of the facility; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the line facility; and (6) the operating pressure of the lines. *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (D.C.Cir.2000). In addition, FERC considers the following "non-physical" criteria: (1) the purpose, location and operation of the facility; (2) the general business activity of the owner of the facility; (3) whether a jurisdictional determination, i.e., gathering versus transmission, is consistent with the objectives of the Natural Gas Act and other legislation; and (4) the changing technical and geographic nature of exploration and production activities. *Id.* No one factor is determinative in the primary

function test, and not all factors apply in all situations. *See Williams Field Servs. Group, Inc. v. FERC*, 194 F.3d 110, 116 (D.C.Cir.1999); *Conoco*, 90 F.3d at 543. The Commission "gives consideration to all of the facts and circumstances of the case rather than mechanically applying a facilities configuration standard." *West Tex. Gathering Co.*, 45 F.E.R.C. ¶ 61,386, at 62,219 n.4, 1988 WL 246728 (1988); *see also Conoco*, 90 F.3d at 543.

When these physical factors were developed, most jurisdictional questions involved onshore facilities. As an increasing number of facilities have been constructed offshore on the Outer Continental Shelf ("OCS"), where the pattern of gathering and distribution differs, the applicability of the factors has been questioned. *See, e.g., EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir.1989). Specifically, it is often not feasible to process raw gas on open water. As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where "[o]nly the most rudimentary separation and dehydration operations" are conducted, *EP Operating*, 876 F.2d at 47, to the shore or a point closer to shore, where it can be processed into "pipeline quality" gas. *Id.* at 48. In *EP Operating Co.*, the Fifth Circuit discounted FERC's ruling that the offshore platform where initial gas treatment took place constituted a "central point in the field" where the gathering function was complete, and reversed FERC's decision that the 51-mile long, 16-inch diameter OCS pipeline downstream of that platform was a jurisdictional transportation facility. *See id.* at 49. Following *EP Operating Co.*, FERC noted that "because of recent advances in engineering and available technology, offshore drilling operations continue to move further offshore and further from existing interstate pipeline interconnections" and therefore the Commission would

assess "the continuing viability and relevance of the 'primary function' test to current industry conditions." *Amerada Hess*, 52 F.E.R.C. at 61,988. FERC then modified its primary function test to apply a sliding scale, "allow[ing for] the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area," *id.* at 61,988, and to consider the "non-physical" criteria described above. This "modified" primary function test was applied by FERC when Sea Robin petitioned in 1995 for a declaration that its facilities perform a gathering function, rather than transportation, thus entitling Sea Robin to exemption from the Commission's jurisdiction under section 1(b) of the Act.

B. Sea Robin's Pipeline System[3]

Sea Robin's pipeline system is located entirely offshore in the Gulf of Mexico and approximately 90 percent of its facilities lie in water depths of less than 140 feet. It is one of numerous competing pipeline systems located in the Gulf. The Sea Robin system is configured roughly in the form of an inverted "Y" with two arteries stretching roughly southwest and southeast from a central point about fifty miles south of the Louisiana coast. These two pipelines collect raw gas from sixty-seven offshore production platforms. Sea Robin's Vermilion 149 Compressor Station stands at the intersection of these two pipelines. It compresses the gas from the sixty-seven platforms for travel north, up the inclined seabed, to the Erath Compressor Station on the mainland. After collecting gas from four more platforms, the system terminates near Erath, Louisiana, where the gas is separated, dehydrated and processed. The Erath Compressor Station then prepares the gas for delivery to downstream transmission pipelines at five nearby entry points.

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[3] This discussion is largely taken from *Sea Robin I*, 127 F.3d at 367-68. *See also Sea Robin Pipeline Co.*, 87 F.E.R.C. ¶ 61,384, at 62,430, 1999 WL 444654 (1999).

The Sea Robin system consists of 438 miles of dual-phase pipelines with a capacity to transport 1.26 billion cubic feet of gas per day (Bcf/day) and includes around 69,500 horsepower (hp) of compression. The pipeline is "dual-phase" in that it carries a raw stream of unpurified natural gas and liquid hydrocarbons taken directly from the gas wells. The total compression horsepower at the Vermilion 149 Station is 37,050 hp and is 32,490 hp at Erath, Louisiana. Of the 438 miles of pipes, 339 miles are larger than twenty inches in diameter. The remaining ninety-nine miles of pipes, mostly running from individual platforms to the larger pipes, are between four and sixteen inches in diameter.

Along the two arms of the inverted "Y," which extend out in the Outer Continental Shelf, 45 lateral lines with diameters ranging from 4.5 to 30 inches are connected to 67 receipt points located on production platforms, or at subsea taps where Sea Robin's facilities intersect with short lateral lines of producers or pipelines. Through these upstream arms, Sea Robin moves the raw gas to the Vermilion 149 Station at the fork of the "Y," a manned platform with two turbine compressor units of 12,350 horsepower each. From there, the gas moves along the Vermilion 149-Erath segment. That segment is the longest portion of the pipeline, consisting of 66.3 miles of 36-inch diameter pipeline running in a straight line from Sea Robin's Vermilion compressor station to onshore processing facilities. Gas from four additional platforms is mingled with the gas traveling the Vermilion 149-Erath segment. The four platforms along this section are within twenty-five miles of the Vermilion compressor station, which means that the last forty-one miles of the thirty-six inch diameter pipeline are uninterrupted by lateral pipe segments. The gas and liquefiables delivered by Sea Robin meet the merchantable natural gas quality standards of downstream transmission pipelines.

FERC issued the original certificate for the Sea Robin system in 1969, pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), authorizing the system to both sell and transport gas from the Outer Continental Shelf. *Sea Robin Pipeline Co.*, 41 F.P.C. 257, 1969 WL 5152 (1969). In later years the Commission certificated extensions of the Sea Robin system farther out on the OCS. *See Sea Robin Pipeline Co.*, 87 F.E.R.C. at 62,429 n. 26. Subsequently, Sea Robin became a transportation-only pipeline, and its shippers today consist of producers and marketers that transport gas onshore for ultimate delivery to markets on connecting interstate pipelines. *Id.* at 62,428.

C. Prior Proceedings

In 1995, the Sea Robin Pipeline Company petitioned FERC for a declaration that its facilities perform a "gathering" function, rather than "transportation," and are thus not subject to the Commission's jurisdiction under section 1(b) of the Natural Gas Act. *See Sea Robin I*, 127 F.3d at 367. FERC denied Sea Robin's petition, determining that its pipelines were engaged in jurisdictional transportation activities. *See id.*; *Sea Robin Pipeline Co.*, 71 F.E.R.C. ¶ 61,351, 1995 WL 361806 (1995), *order denying reh'g*, 75 F.E.R.C. ¶ 61,332, 1996 WL 355518 (1996). In reaching its conclusion, FERC emphasized the "*very large size* of [Sea Robin's] system." *Sea Robin Pipeline Co.*, 71 F.E.R.C. at 62,398 (emphasis in original). According to the Commission, "the length and diameter of the system's components, as well as its overall size, [we]re not outweighed by other elements of the 'primary function' test." *Id.* Further, FERC "repeatedly emphasized that the non-physical criteria in its test supported its conclusion that Sea Robin was a transporter, particularly Sea Robin's prior certification as a jurisdictional pipeline and its ownership by an interstate pipeline." *Sea Robin I*, 127 F.3d at 369-70. Sea Robin petitioned for review of FERC's order in the U.S. Court of

Appeals for the Fifth Circuit. The Fifth Circuit granted that petition for review, vacated the order, and remanded to the Commission. *Sea Robin I*, 127 F.3d at 372.

Specifically, the Fifth Circuit questioned FERC's reliance on the size of Sea Robin's system as "presumptively" determinative, as well as the apparent abandonment, without reasoned consideration, of the "sliding scale" approach announced by the Commission in *Amerada Hess,* 52 F.E.R.C. ¶ 61,268 (1990). *See Sea Robin I,* 127 F.3d at 370. The Fifth Circuit concluded that FERC had "reverted to its single factor, bright-line approaches that it had previously rejected as unworkable for offshore pipelines." *Id.* (citing *Northwest Pipeline Corp.,* 905 F.2d at 1409; *EP Operating Co.,* 876 F.2d at 48). The Court also faulted the Commission for the reliance it placed on non-physical considerations, such as Sea Robin's ownership and shipper expectations. *See* 127 F.3d at 370-71 ("If the Commission is to remain tethered to the statute, as it must, that inquiry must be based primarily on physical criteria and the realities of the field."). The Fifth Circuit "intend[ed] that [non-physical criteria] be put in its place as considerations secondary to the physical factors." *Id.* at 371. Finally, the Fifth Circuit found FERC's "regulatory gap" argument, that a regulatory gap might arise if Sea Robin was held to be a gathering system, wanting: "Need for regulation cannot alone create authority to regulate." *Id.*

In remanding to the Commission, the Fifth Circuit acknowledged that "Sea Robin's system resists easy categorization because the logistics of offshore pipelines obscures differences between gathering gas from Gulf platforms and transporting it to the mainland." *Sea Robin I,* 127 F.3d at 370. It also observed that "the pattern of gathering and distribution on shore differs from the pattern of transportation and gathering of gas from the middle of the Gulf to the mainland," *id.*, and suggested that FERC "again

consider the applicability of the primary function test to offshore pipeline systems and if necessary, reformulate this test." *Id.* at 367. The Court noted that on remand, "Sea Robin may choose to respond to the Commission's invitation to offer portions of its system as predominantly involved in a gathering or a transportation function." *Id.* at 371 (footnote omitted). In doing so, the Court specifically admonished the Commission that "[d]iscomfort in drawing the jurisdictional line at points internal to an overall system may be soothed with the reminder that Congress did not intend to extend FERC's jurisdiction to all natural gas pipelines; indeed it demands the drawing of jurisdictional lines, even when the end of gathering is not easily located." *Id.* The Court opined that the Commission could "consider, for example, a distinction between the field south of the Vermilion Compressor Station and the pipelines leading north to Erath, Louisiana." *Id.*

On remand, FERC accepted the Fifth Circuit's invitation to reformulate its primary function test. *Sea Robin Pipeline Co.*, 87 F.E.R.C. ¶ 61,384, 1999 WL 444654 (1999) ("*Remand Order*"). In reformulating its primary function test, the Commission concluded that the "behind-the-plant" factor is not necessarily determinative of where gathering ends when applied to offshore facilities. *See id.* at 62,425. Further, FERC determined that it would "assess the physical configuration of offshore pipeline systems to determine if there exists a central location where gas is aggregated for further transportation to shore." *Id.* Such a location would be the "offshore analogue of the onshore 'central-point-in-the-field' criterion." *Id.* In cases where a pipeline system is configured to deliver gas collected from upstream wells to a centralized location through several relatively small diameter lines for further delivery onshore through a single larger diameter pipeline, that centralized aggregation location is considered by FERC to be analogous to the central-point-in-the-field factor and "given weight in identifying the

demarcation point between gathering and transportation on OCS pipeline systems." *Id.* at 62,426. Thus, the Commission was willing to consider, as suggested by the Fifth Circuit, that the demarcation point between gathering and transmission on a system like Sea Robin's could be determined to be at a point internal to an overall pipeline system. *See Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072, at 61,285 (2000) ("*Rehearing Order*").

Applying its reformulated primary function test, the Commission concluded that Sea Robin's pipeline facilities comprise two distinct components: a jurisdictional transportation system from the Vermilion 149 Station to Erath, and a non-jurisdictional gathering system upstream of the Vermilion 149 Station. *See Remand Order*, 87 F.E.R.C. at 62,426. FERC found that the primary function of the Vermilion-Erath line "is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point where gas is aggregated and compressed," namely the Vermilion 149 Station. *Id.* at 62,432.

In support of its decision to draw the jurisdictional line at the Vermilion 149 Compressor Station, the Commission emphasized certain key aspects of the system's overall physical configuration. Specifically, FERC found that the "straight-shot" geographical configuration of Sea Robin's system downstream of the Vermilion 149 Station, interconnecting with only two laterals delivering gas from only four wells along its 66.3-mile length, and the line's large 36-inch diameter are indicative of transportation. *See id.* at 62,430. In contrast, the facilities upstream of the Vermilion 149 Station interconnect with 45 laterals connected to 67 production platforms, and the lines are 30 inches or less in diameter. *See id.* at 62,431. Moreover, FERC found that the compression that occurs at Vermilion 149 "is typical of compression found on large diameter transportation lines

transporting high volumes of gas over relatively long distances," rather than "field compression" associated with production. *Id.* at 62,430. According to FERC, the Vermilion 149 Station thus represented a central aggregation location highly suggestive of the demarcation point between gathering and transportation. *See id.* at 62,431. The Commission concluded that in the "most fundamental meaning of the 'primary function' test, the 'totality of the circumstances' demonstrates that the primary function of the Vermilion-Erath Line is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point where the gas is aggregated and compressed," and these smaller lines upstream of Vermilion 149 are engaged in non-jurisdictional gathering. *Id.* at 62,432.

On rehearing, the Commission adhered to its position. *See Rehearing Order,* 92 F.E.R.C. at 61,284. FERC reiterated that its reformulated primary function test included: (1) consideration of an additional analytical element applicable where OCS pipeline facilities exhibit a "centralized aggregation point"; (2) adjustment in the weight to be afforded the behind-the-plant criterion on the OCS; and (3) a primary focus on physical factors. *Id.* at 61,285. It addressed arguments from the petitioners that all of Sea Robin's system was engaged in jurisdictional transportation, and arguments from Sea Robin that its system was engaged entirely in non-jurisdictional gathering.[4] Specifically the *Rehearing Order* identifies 13 physical factors considered in concluding that

[4] Sea Robin no longer challenges FERC's *Remand Order* and supports the Commission's decision to draw the line between jurisdictional transportation and non-jurisdictional gathering at the Vermilion 149 Station.

the facilities upstream of the Vermilion 149 Station are engaged in non-jurisdictional gathering. *See id.* at 61,291. These physical factors are:

(1) the 66.3 mile length of the Vermillion-Erath line;

(2) the 36-inch diameter of the Vermillion-Erath line;

(3) the straight-line configuration of the Vermillion-Erath line;

(4) the inverted-Y configuration of the Sea Robin System;

(5) the existence of only four platforms along the length of the Vermillion-Erath line as compared to the connections to 71 production platforms upstream of the Vermillion 149 Compressor Station;

(6) the abrupt change in physical attributes and configuration in the system occurring at the Vermillion 149 Compressor Station;

(7) the concentration of compression at the Vermillion 149 Compressor Station;

(8) the existence of a centralized aggregation location at the Vermillion 149 Compressor Station;

(9) the 4.5 to 24 inch diameters of the lines upstream of the Vermillion 149 Compressor Station;

(10) the existence of 45 laterals feeding into the two upstream arms of the inverted-Y upstream of the Vermillion 149 Compressor station;

(11) the presence of 71 production platforms connected to the system upstream of the Vermillion 149 Compressor station;

(12) the network configuration of Sea Robin's facilities upstream of the Vermillion 149 Compressor Station; and

(13) the onshore location of processing plants, which was not considered a determinative factor due to the geographic and technical characteristic of production and transportation offshore.

Id. Further, FERC rejected the argument that it had substituted the new "centralized aggregation point" criteria for its prior impermissible reliance on a single-factor test. Rather, it explained, "the centralized-aggregation-point is more appropriately viewed as a descriptive label for a set of a number of individual physical characteristics." *Id.* "Just as the historical behind-the-plant and central-point-in-the-field factors are based on the existence of a confluence of individual elements, the new centralized-aggregation-point factor also is an example of an additional physical factor that can arise as the result of the combination of several individual physical components. . . ." *Id.* at 61,292. Relying on the Fifth Circuit's *Sea Robin I* decision, the Commission rejected the suggestion that various production platforms, rather than the Vermilion 149 Station, are centralized aggregation points. *See id.*

Similarly, the Commission relied on the Fifth Circuit's decision to reject the suggestion that the reformulated primary function test would create an unlawful "regulatory gap" on the Outer Continental Shelf. *See id.* at 61,293 (citing *Sea Robin I*, 127 F.3d at 371). Moreover, FERC claimed to have addressed such "regulatory gap" concerns in its separate decision to promulgate regulations under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, to ensure that natural gas is transported in an open and nondiscriminatory manner. *Rehearing Order*, 92 F.E.R.C. at 61,293 (citing 65 Fed.Reg. 20,354 (Apr. 17, 2000)).

FERC also addressed arguments that it had given inadequate attention to the impact of the jurisdictional determination on the settled expectations of customers and on new upstream deepwater systems. The Commission found that

the "remanding Court's directions on this point were clear. The Court ruled that while the practical effect of the determination of gathering is relevant, the primary consideration in formulating a jurisdictional test must be the physical characteristics that distinguish gathering from transmission." *Id.* at 61,293-94 (citing *Sea Robin I*, 127 F.3d at 371). Thus, although FERC considered these non-physical factors, the primary focus, as required by the Fifth Circuit, had to be the physical factors, and those factors supported drawing the jurisdictional line at the Vermilion 149 Station. *See id.* at 61,294.

Finally, FERC considered and rejected arguments that: (1) a 1978 amendment to OCSLA purportedly equated the scope of the "gathering" exemption in the Natural Gas Act with the concept of "feeder lines," *see id.*; (2) certificates issued to Sea Robin for the reclassified non-jurisdictional facilities must be subject to "abandonment" proceedings pursuant to section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), *see id.* at 61,294-95; and (3) the fact that a jurisdictional upstream pipeline (the Garden Banks pipeline) delivers gas into the east leg of Sea Robin's system upstream of the Vermilion 149 Station prevents the Commission from reclassifying the Sea Robin system as non-jurisdictional. *See id.* at 61,295. On this last issue, petitioners contended that FERC had violated its prior ruling in *Tarpon Transmission Co.*, 60 F.E.R.C. ¶ 61,041, 1992 WL 166429 (1992), which they read as precluding pipeline facilities that carry gas delivered by a jurisdictional transportation pipeline from being classified as gathering facilities. FERC noted that this issue was raised for the first time on rehearing; however, the Commission went on to hold that the petitioners' reliance on *Tarpon* was misplaced. *See Rehearing Order*, 92 F.E.R.C. at 61,295. Although the presence of upstream transportation facilities was one factor considered in *Tarpon*, the real concern in that proceeding was that finding Tarpon's facilities to be engaged in non-jurisdictional gathering would

have left shippers and producers unprotected from the exercise of monopoly power. *See id.* FERC concluded that such concerns were no longer relevant for facilities exempt from the Natural Gas Act because of the Commission's new OCSLA anti-discrimination regulations. *Id.* at 61,295-96.

ExxonMobil and the Producer Coalition filed timely petitions for review challenging the *Remand Order* and the *Rehearing Order* in this Court.

II. Analysis

The challenged orders are subject to reversal if the FERC's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In making this determination, "[t]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971); *see Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983). To the extent that the petitioners are challenging FERC's interpretation of section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), we apply the two-step approach of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). When Congress has spoken, we are bound by that pronouncement and that ends this Court's inquiry. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82 (*Chevron* step one). Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. at 2782 (footnote omitted) (*Chevron* step two).

In reviewing the Commission's determinations, we are mindful that "[t]he line between jurisdictional transportation and non-jurisdictional gathering is not always clear." *Conoco*, 90 F.3d at 542. The jurisdictional determination under section 1(b) of the Act is "a line-drawing problem for which there is no easy answer." *Williams Field Servs.*, 194 F.3d at 118. Thus, "it is not this court's role to interpose its judgment." *Id.* Rather, we are mindful that in "evaluating and balancing the several factors under the primary function test, the Commission brings to bear its considerable expertise about the natural gas industry." *Conoco*, 90 F.3d at 544; *see also Lomak*, 206 F.3d at 1196-97; *Williams Field Servs.*, 194 F.3d at 118. "Accordingly, we will uphold the Commission's application of the test as long as it gives 'reasoned consideration to each of the pertinent factors' and articulates factual conclusions that are supported by substantial evidence in the record." *Lomak*, 206 F.3d at 1197 (quoting *Conoco*, 90 F.3d at 544); *see* 15 U.S.C. § 717r(b) ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."). The burden is on the petitioners to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a "'zone of reasonableness'" as distinct from the question of whether the line drawn by the Commission is "precisely right." *Hercules Inc. v. EPA*, 598 F.2d 91, 107 (D.C.Cir.1978) (quoting *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 278, 96 S.Ct. 1999, 2004, 48 L.Ed.2d 626 (1976)). We cannot say that the Commission acted unreasonably either in interpreting the Natural Gas Act or declining to exercise jurisdiction over portions of Sea Robin's system. Therefore petitioners have failed to carry their burden, and the petitions must be denied.

A.

ExxonMobil challenges FERC's determination that the Vermilion 149 Station is a reasonable point at which the Commission may draw the line between non-jurisdictional

gathering and jurisdictional transportation. It contends that the added compression at Vermilion 149 only serves to push and pull gas along an "integrated" transportation system. Petitioner proposes that the individual production platforms mark the point at which gathering ends and transportation begins. However, petitioner's differing interpretation of the physical factors present on the Sea Robin system does not provide us with a basis to upset the Commission's order. Reasonable people may disagree as to where gathering ends and transportation begins. Were we the Federal Energy Regulatory Commission, we might draw the line at Erath. Others might draw it at the production platforms themselves. *But see EP Operating Co.*, 876 F.2d at 49. But after considering the inherent ambiguity in the statute and the fact that "[t]he line between jurisdictional transportation and non-jurisdictional gathering is not always clear," *Conoco*, 90 F.3d at 542, (as it is not clear here) we simply cannot conclude that the Commission's choice of the Vermilion 149 Station as the dividing line was unreasonable, especially in light of the Fifth Circuit's decision on remand. *See Sea Robin I*, 127 F.3d at 371. We therefore hold that the Commission's choice, if not unassailable, is at least defensible, and survives the arbitrary-and-capricious review of the Administrative Procedure Act.

FERC relied on the smaller dimensions of the upstream lines in contrast to the 36-inch Vermilion-Erath line; the 45 laterals feeding into the two upstream arms; the 67 production platforms connected to the upstream facilities compared with only four downstream; the network configuration of the upstream facilities; and the need for added compression at the Vermilion 149 Station to move gas to shore. *See Rehearing Order*, 92 F.E.R.C. at 61,291-92. All of these physical factors show a meaningful distinction between the facilities upstream and downstream of Vermilion 149 and make it reasonable to define it as the central aggregation point. Obedient to the Fifth Circuit's suggestion, FERC

examined Sea Robin's system in parts, rather than as a whole, and reasonably concluded that different parts of the system required different jurisdictional treatment. Moreover, as described by the Commission, the central aggregation test is not a new, bright-line test, but rather is an amalgamation of physical factors, and in any event, is wholly consistent with past FERC precedent. It has long been the Commission's view, upheld by this Court, among others, that when gas from separate wells is collected by several lines which converge at a single location in the producing field for delivery into a single line for transportation, the separate lateral lines behind the central point are classified as non-jurisdictional gathering facilities. *Accord Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957). That aptly describes the Sea Robin system. At Vermilion 149 gas from several lateral lines is brought together and propelled to shore. The dissent is critical of FERC's determination because in its view, "[s]urely a 'fork in the road' cannot be the demarcation line between unregulated production/gathering and regulated transportation." Dis. Op. at 5. But why not? Cannot two roads diverging (or in this case, converging) make all the difference? Indeed, has that not always been the thrust of the Commission's "central-point-in-the-field" test? In this case, the forks of the "Y" gathered gas from production platforms at 67 receipt points, whereas the straight segment received gas at only four such points; the forks were pipes of smaller diameter than that of the straight segment; and the forks required less compression to move the gas along. Moreover, the line between gathering and transportation is inherently elusive, *see, e.g., Conoco*, 90 F.3d at 542, and FERC "has wide discretion to determine where to draw administrative lines." *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C.Cir.2000). It is for the Commission, in the first instance, to determine the patterns of gathering and transportation in the offshore context. "We are generally 'unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn

. . . are patently unreasonable, having no relationship to the underlying regulatory problem.'" *Cassell v. FCC,* 154 F.3d 478, 485 (D.C.Cir.1998) (quoting *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 60 (D.C.Cir.1977)). We conclude that petitioner has failed to carry its burden.

ExxonMobil makes much of the Supreme Court's language in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90, 83 S.Ct. 646, 649-50, 9 L.Ed.2d 601 (1963), in which the Court held that "'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." Thus, petitioner essentially contends that given the length and size of the upstream portion of Sea Robin's system, it cannot possibly be involved in gathering, as described by the Supreme Court. However, the Fifth Circuit expressly rejected FERC's *per se* reliance on length of a pipeline, holding that a 51-mile pipeline was non-jurisdictional. *EP Operating Co.*, 876 F.2d at 49. This same decision weighs against FERC's treating the production platforms as central aggregation points as well. *See id.* Rather, the Fifth Circuit required the Commission to recognize that "the pattern of gathering and distribution on shore differs from the pattern of transportation and gathering of gas from the middle of the Gulf to the mainland." *Sea Robin I*, 127 F.3d at 370; *see also Amerada Hess*, 52 F.E.R.C. at 61,988 (adopting the "modified primary function test" in response to *EP Operating Co.*, and in recognition of the "changing technical and geographic nature of exploration and production"). Given these different physical realities, what might not seem "narrowly confined" in the on-shore context, may well be on the Outer Continental Shelf. *Cf. West v. Gibson*, 527 U.S. 212, 218, 119 S.Ct. 1906, 1910, 144 L.Ed.2d 196 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in the law or in the world, require their application."); *Oncale v. Sundowner*

Offshore Servs., Inc., 523 U.S. 75, 79, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201 (1998) (statutory provisions often go beyond "the principal evil Congress was concerned with"). Given this backdrop, we cannot conclude that FERC's determination is unreasonable here.

Moreover, we have previously recognized the limited reach of the Supreme Court's holding in *Northern Natural*. In each case in which the Supreme Court "has applied this narrow definition of 'production' and 'gathering' to uphold the Commission's jurisdiction, the regulated entity was engaged in a jurisdictional activity." *Conoco*, 90 F.3d at 545. Thus, "when a natural gas company provided *bundled sales* and interstate transportation from its own wells to consumers and distributors, the Commission could properly include the company's production and gathering costs in its rate base for the *bundled service*." *Id.* We found that it was in the "context" of *bundled* jurisdictional and non-jurisdictional activities that "the Court defined 'gathering' narrowly, as limited to activities preceding sales for resale." *Id.* at 546 (citing *Phillips Petroleum*, 347 U.S. at 678, 74 S.Ct. at 796-97). But we now live in an unbundled world. *See id.* at 539-40 (observing that in Order No. 636, FERC "mandat[ed] the unbundling of gas sales and interstate transportation . . . in order to give pipeline customers unimpeded access to the competitive wellhead market and to permit all gas sellers to compete on an equal basis"). Sea Robin is no longer involved in the sales of gas from the OCS—it is now strictly a transportation system. *Remand Order*, 87 F.E.R.C. at 62,428. Therefore the Supreme Court's restrictive definition of "gathering," while clearly relevant, must be considered in context. In the context of unbundled, off-shore pipeline systems, "the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution," *Northern Natural Gas*, 372 U.S. at 90, 83 S.Ct. at 650, cannot be as

narrowly construed as on-shore. *Accord Sea Robin I*, 127 F.3d at 370; *EP Operating Co.*, 876 F.2d at 49; *Amerada Hess*, 52 F.E.R.C. at 61,988.

ExxonMobil faults the Commission for failing to give weight to the previously "settled status" of the classification of Sea Robin's pipeline as engaged in jurisdictional transportation. However, as alluded to above, these petitions, like those in *Conoco*, "arise in the wake of major regulatory changes in the natural gas industry." *Conoco*, 90 F.3d at 539. Whereas Sea Robin was once involved in sales and transportation, now it is strictly a transportation-only pipeline. When interstate gas pipelines served the multi-function role of purchasing, gathering, transporting, and re-selling natural gas, *i.e.* bundled sales, the transportation/gathering jurisdictional question may have been of less consequence. *See, e.g., El Paso Natural Gas Co.*, 72 F.E.R.C. ¶ 61,219, at 62,002, 1995 WL 544234 (1995) ("Under [a] bundled sales regulatory environment, the gathering/transmission function distinction was not as important as it is in a post-Order 636 environment [requiring unbundling]. . . . Consequently, many facilities that actually perform a gathering function originally were construed under [Natural Gas Act] section 7 certificates."); *CNG Transmission Corp.*, 67 F.E.R.C. ¶ 61,330, at 62,177, 1994 WL 270455 (1994). Thus, the historical classification of Sea Robin's system is of limited utility. Moreover, the Fifth Circuit expressly instructed FERC in this case to relegate non-physical factors, such as the "settled status" of a pipeline, and the expectations of shippers to secondary status: "If the Commission is to remain tethered to the statute, as it must, that inquiry must be based primarily on physical criteria and the realities of the field." *Sea Robin I*, 127 F.3d at 371. The Fifth Circuit held that "general business activity and prior certification are relevant, but they are only part of the mix." *Id.* We agree. Therefore, as FERC adequately considered non-physical

factors, but properly relied primarily on physical factors, again, we cannot find its decision to decline jurisdiction over a portion of Sea Robin's system unreasonable.

Similarly, we find ExxonMobil's argument that FERC's jurisdictional ruling has created an "utterly illogical situation," wherein gas is transported on a jurisdictional pipeline (the Garden Banks pipeline) into a non-jurisdictional gathering leg of Sea Robin's pipeline, unavailing. Petitioners rely on *Tarpon Transmission Co.*, 60 F.E.R.C. ¶ 61,041, 1992 WL 166429 (1992), and *Trunkline Gas Co.*, 70 F.E.R.C. ¶ 61,163, 1995 WL 58234 (1995), for the proposition that the presence of an interconnection with an upstream jurisdictional facility compels a finding that the downstream facility is likewise jurisdictional. First, reliance on these orders for such a proposition is inherently suspect as in both instances the classification of the upstream system was in dispute, and in both cases the upstream system was reclassified as non-jurisdictional. If anything, this suggests that it is the Garden Banks̄ pipeline, rather than Sea Robin, that has been erroneously classified. To hold that the Garden Banks pipeline's jurisdictional status compelled FERC to classify Sea Robin's system as jurisdictional would create a classic example of circular reasoning. When Garden Banks requested a non-jurisdictional gathering classification, FERC ruled that it was jurisdictional *because it was located "proximate to jurisdictional lines."* *Shell Gas Pipeline Co.*, 74 F.E.R.C. ¶ 61,277, at 61,897, 1996 WL 111350 (1996) (emphasis added). Thus, proximity to Sea Robin, among other pipelines, resulted in Garden Banks's jurisdictional classification. To now hold that Garden Banks's interconnection with Sea Robin requires the latter to also be jurisdictional, is for the tail to wag the dog. Perhaps the present inconsistent treatment of the Garden Banks pipeline and the Sea Robin pipeline is "positively absurd," as suggested by the dissent, Dis. Op. at 7, but that does not mean that the problem is necessarily with Sea Robin's

classification. FERC has been struggling with the reclassification of facilities in the wake of the unbundling of gas sales and interstate transportation in Order No. 636. *See Conoco*, 90 F.3d at 539-41. As it is entirely appropriate for FERC to proceed on a case-by-case basis, *see SEC v. Chenery Corp.*, 332 U.S. 194, 202-03, 67 S.Ct. 1575, 1580-81, 91 L.Ed. 1995 (1947), then "the reform may take one step at a time." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). We do not mean to pre-judge how FERC might apply its reformulated primary function test to Garden Banks. We only conclude that the status of the Garden Banks pipeline does not render the Commission's reclassification of portions of Sea Robin's system unreasonable.

We turn now to ExxonMobil's least persuasive argument—that FERC's determination that portions of Sea Robin's system are engaged in non-jurisdictional gathering results in a "regulatory gap." We find this argument no more persuasive than did the Fifth Circuit. We emphatically agree that "[n]eed for regulation cannot alone create authority to regulate." *Sea Robin I*, 127 F.3d at 371. Rather it is *statutory authorization* alone that gives FERC the authority to regulate, and in the absence of such authority, FERC's action "'is plainly contrary to law and cannot stand.'" *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C.Cir.2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001)). Here Congress clearly contemplates that the Commission will not have jurisdiction under the Natural Gas Act over "the production or gathering of natural gas." 15 U.S.C. § 717(b). The language could not be any plainer. We have repeatedly admonished federal agencies that jurisdiction may not be *presumed* based solely on the fact that there is not an express withholding of jurisdiction. *E.g., Atlantic City Elec. Co.*, 295 F.3d at 8-9; *Michigan*, 268 F.3d at 1082; *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C.Cir.1995); *Ethyl*

Corp. v. EPA, 51 F.3d 1053, 1060 (D.C.Cir.1995). Where Congress has gone so far as to *expressly* delineate the limits of agency jurisdiction, we cannot fault the Commission for taking a conservative view of its own authority.

Finally, we can quickly dispense with ExxonMobil's argument that Sea Robin's system was subject to abandonment proceedings under section 7(b) of the Act, 15 U.S.C. § 717f(b). Simply put, Sea Robin does not seek to abandon any facilities or services. Rather, it merely seeks to be able to continue operating previously certificated facilities as gathering facilities, exempt from FERC's jurisdiction under the Natural Gas Act. This is not "abandonment" within the meaning of section 7(b). *Cf. Conoco*, 90 F.3d at 553. In addition, section 7(b) only applies to jurisdictional facilities, and "do[es] not expand the Commission's § 1(b) jurisdiction." *Id.* Therefore it cannot be used to bootstrap FERC jurisdiction here.

B.

The Producer Coalition argues that the scope of the "gathering" exemption under section 1(b) of the Natural Gas Act is defined by the concept of "feeder lines" in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*. Under OCSLA, the Commission is responsible for ensuring open and nondiscriminatory access to transportation of oil and gas for all shippers on the Outer Continental Shelf. 43 U.S.C. § 1334(f)(1)(A). FERC, however, may exempt from OCSLA's requirements "any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed." 43 U.S.C. § 1334(f)(2). The Producer Coalition contends that the scope of exemption for "feeder lines" is coterminous with "gathering" facilities under the Natural Gas Act. Thus, in essence the Producer

Coalition contends that FERC's reformulated primary function test is unnecessary and that the Commission has stumbled under *Chevron* step one.

In support of its position, the Producer Coalition relies on bits and pieces of legislative history surrounding the 1978 Amendments to OCSLA. But snippets of legislative history do not a law make. *Accord Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24, 11 L.Ed. 469 (1845); *In re Sealed Case*, 237 F.3d 657, 669 (D.C.Cir.2001) ("The limits on the Commission's authority—like that authority itself—are derived from statutory provisions, not from loosely worded fragments extracted from congressional reports and speeches"). Petitioners offer no direct evidence of congressional intent to fill in the Natural Gas Act definition of "gathering" *sub silentio* by reference to the feeder line concept. Indeed, there is no definition of "gathering" in the OCSLA, and it does not even use the term. Rather the Producer Coalition relies on isolated excerpts from the floor discussion by Congressman Sieberling. While Congressman Sieberling may have spoken, Congress has not.

Morever, it would be anomalous to treat the "feeder line" provision of OCSLA and the "gathering" exemption of the Natural Gas Act as redundant. Under the Producer Coalition's interpretation, in enacting the OCSLA Amendments, Congress would have replicated the non-discriminatory provisions already contained in the Natural Gas Act. *Compare* 43 U.S.C. § 1334(f)(a)(1)(A) (OCSLA), *with* 15 U.S.C. §§ 717c(b), 717d(a) (Natural Gas Act). Likewise, there would have been no need to authorize the Commission to exempt "feeder lines" from FERC jurisdiction if they were already exempt as gathering facilities. Rather, a more plausible inference is that Congress amended OCSLA to make OCS facilities not covered by the Natural Gas Act subject to similar nondiscriminatory requirements, with the exception of "feeder lines." However, we do not decide

whether it would be reasonable for FERC to equate the feeder line and gathering facilities exemptions. We simply hold that FERC's interpretation of section 1(b) of the Natural Gas Act is not unreasonable, and therefore *Chevron* deference is applicable.

III. Conclusion

FERC's jurisdiction over natural gas pipelines "demands the drawing of jurisdictional lines, even when the end of gathering is not easily located." *Sea Robin I*, 127 F.3d at 371. Although we might draw a different line, we cannot say that the Commission acted unreasonably in concluding that the Vermilion 149 Station is the place where nonjurisdictional gathering ends and jurisdictional transportation begins. It is not our role to substitute our own judgment for that of the agency. Given the instructions of the United States Court of Appeals for the Fifth Circuit on remand, we cannot say that FERC has failed to give appropriate consideration to the primary physical factors and the secondary non-physical factors of its reformulated primary function test. Therefore the petitions for review are denied.

So ordered.

HARRY T. EDWARDS, Circuit Judge, dissenting.

The issue in this case focuses on the line between the "transportation" of natural gas and the "gathering" of natural gas. For many years, most of the Sea Robin Pipeline Company complex in the Gulf of Mexico has been designated as a *transportation* facility, and, thus, within the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission") under the Natural Gas Act ("NGA"). Now, however, the Commission has partially reversed that settled status, reclassifying a major segment of the Sea Robin pipeline as engaged in nonjurisdictional gathering. In my view, FERC's decision is devoid of reasoned decision making. I therefore dissent from the court's decision denying the petition for review.

* * * *

Sea Robin operates a massive pipeline complex (438 miles overall), almost all of which is located offshore on top of the Outer Continental Shelf ("OCS") in the Gulf of Mexico. This system is shaped like an inverted "Y," whose two arms sweep across the OCS to meet at a point approximately 50 miles off the coast of Louisiana. The Vermillion 149 Compressor Station sits at this point of convergence. There, much of the gas flowing from various production platforms that feed into the system comes together for shipment 66 miles north to Sea Robin's onshore processing plants near Erath, Louisiana. During the journey to Erath, the aggregated gas is joined by additional gas from four platforms located closer to the shore. Once the gas reaches shore, it is separated, dehydrated, and processed, then transported to the Erath Compressor Station from whence it is pumped into interstate pipelines for downstream delivery. (See Appendix.)

Before the challenged reclassification of the Sea Robin system, once the gas was produced and gathered at the production platforms south (upstream) of Vermillion, it was deemed to be in "transportation," and thus within FERC's

jurisdiction. In 1995, Sea Robin sought to undo this regulatory situation. The company asked FERC for an order declaring that its pipelines were gathering facilities exempt from the Commission's jurisdiction under the § 1(b) of the NGA. FERC refused, holding that the primary function of Sea Robin's system was transportation. *Sea Robin Pipeline Co.*, 71 F.E.R.C. (CCH) ¶ 61,351, 1995 WL 361806 (1995). Rehearing was sought, but denied, *Sea Robin Pipeline Co.*, 75 F.E.R.C. ¶ 61,332, 1996 WL 355518 (1996), leading Sea Robin to petition for review in the Fifth Circuit. The court granted the petition, remanding the case to FERC for further consideration. *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir.1997) ("*Sea Robin I*").

Sea Robin I held that the Commission's decision to deny reclassification was arbitrary and capricious because the agency did not fairly apply the "primary function" test that it had adopted as the touchstone for its analysis. In *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063, 1983 WL 39391 (1983), and subsequent decisions, FERC had identified six factors that were to guide the functional inquiry into whether a pipeline is a gatherer or a transporter:

(1) the diameter and length of the facility

(2) the location of compressors and processing plants

(3) the extension of facility beyond the central point in the field

(4) the location of wells along the facility

(5) the geographical configuration of the field

(6) the operating pressure of the line

See EP Operating Co. v. FERC, 876 F.2d 46, 48 (5th Cir.1989).

This test was developed for, and most readily applies to, land-based pipeline facilities. In order to account for the differences between onshore and offshore facilities, FERC

subsequently attempted to refine the above analysis. *See Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, 1990 WL 1241336 (1990). Because technological advances had allowed drilling and gas production to take place further and further from land, gathering pipelines of increasing length and diameter were being used in places such as the OCS. This reality suggested to FERC that it adopt a "sliding scale" approach to the physical factors identified in *Farmland*: the deeper and further from shore a pipeline, the longer and wider it could be and still be deemed a gatherer. Moreover, in order to ensure that such pipes were properly classified, the agency announced that it would consider certain non-physical factors when applying the primary function analysis. These include the (1) purpose, location, and operation of the facility; (2) the general business activity of the facility; and (3) the overall objectives of the NGA and Natural Gas Policy Act. *Id.* at 61,988.

Sea Robin I held that the Commission erred in selectively applying the *Farmland* factors, over-relying on the non-physical factors described in *Amerada Hess,* and failing to apply the "sliding scale." First, the court held that the Commission impermissibly "reduced the primary function analysis to a litmus test that turned on the length and diameter of the overall system." 127 F.3d at 370. That is, FERC classified Sea Robin's system as one engaged in transportation simply because of the size of its pipes alone, deeming the other *Farmland* factors inapplicable. In so doing, the Commission abandoned, "without reasoned consideration," its earlier recognition that the exigencies of moving offshore gas long-distances to land may require larger pipelines that should not necessarily be classified as transporters. *Id.*

Second, *Sea Robin I* criticized the agency for treating the non-physical factors as the equals of the physical factors in making the gathering/transportation distinction. The Fifth

Circuit reminded FERC that this distinction, as understood by Congress, was primarily a tangible, operational one. As such, while non-physical criteria may be considered, they must remain a secondary "part of the mix," not the starting point for the rest of the analysis. *See id.* at 370-71. Because FERC seemed to have misunderstood these points, the court remanded the case, suggesting that the Commission

> may reformulate its primary function test. It may choose to discontinue criteria not relevant to the physical, geographical, and operational characteristics of pipelines in the OCS. The record suggests other criteria, such as the quality of the gas in the pipelines and the depth of the water in the offshore production area, that may be relevant to the inquiry.

Id. at 371.

The court recognized that the agency might be able to justify drawing the jurisdictional line between gathering and transportation at a point internal to the Sea Robin system, but this suggestion was offered merely in passing dicta. Nothing in the Fifth Circuit's opinion in *Sea Robin I* in any way *compelled* FERC to draw the jurisdictional line at a point internal to Sea Robin's overall system. Nor did anything in the court's opinion *compel* the Commission to select the Vermillion Compressor Station as the dividing point between non-jurisdictional gathering and jurisdictional transportation. FERC, however, apparently threw up its hands in dismay upon reviewing *Sea Robin I*—obviously having no clue what to do to adhere to the court's mandate—and simply opted for Vermillion as the jurisdictional dividing line because it is "central" to the Sea Robin system.

This is the kind of case in which a judge welcomes the opportunity to defer to the expert judgment of a regulatory agency. However, I can find no evidence of FERC "expertise" in operation in this case. Indeed, I view FERC's

decision as totally lacking in reasoned decision making. Because of the Commission's inexplicable reliance on some passing dicta in *Sea Robin I*, its failure to offer a coherent explanation for the choice of Vermillion as the jurisdictional dividing line, and its complete failure to explain why it ignored other choices open to it, I can find no basis upon which to defer to the agency's decision. I therefore dissent.

* * * *

My starting point is the Supreme Court's oft-quoted statement in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90, 83 S.Ct. 646, 649-50, 9 L.Ed.2d 601 (1963):

> '[P]roduction' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution.

In this case, Vermillion is a point where gas coming from different production platforms comes together to be transported further north; but Vermillion is not a place where gas is either *produced* or *gathered*. The production and gathering is done at the many production platforms south of Vermillion—this always has been FERC's understanding, and there are no changed circumstances in this case to justify a different conclusion.

Vermillion is merely a junction in the pipeline, where gas from two preceding forks in the pipeline road come together before the gas travels north in one pipe instead of two. Nothing else of any consequence happens at Vermillion—nothing. Surely a "fork in the road" cannot be the demarcation line between unregulated production/gathering and regulated transportation. Vermillion is not a place where Sea Robin engages in any "*physical acts of drawing the gas from the earth and preparing it for the first stages of distribution*";

it is not, therefore, a place of production and gathering as those terms have been "narrowly" defined by the Supreme Court.

* * * *

As I read the Commission's orders now under review, once FERC identified what it thought was the central point in the field, the Vermillion Station, it then largely ignored the physical characteristics of the pipelines that lay upstream (south) of that point. But, as petitioners rightly point out, those characteristics (size, pressure, configuration) are entirely compatible with a transportation function. If FERC meant to view the Sea Robin system in terms of its consistent parts, rather than as an integrated whole (as it had done prior to the Fifth Circuit's decision), the Commission should have applied its new analysis to each part of the facility that it sought to exempt from its regulatory jurisdiction. That, at least, seems to be the central *holding* of *Sea Robin I*. *See* 127 F.3d at 371 ("If the Commission is to remain tethered to the statute, as it must, [the jurisdictional] inquiry must be based primarily on physical criteria and the realities of the field."). The court's suggestion that FERC might analyze the various parts of the field was not an invitation to ignore the relevant physical properties of the Sea Robin facility.

FERC's focus on the purported *central point* of the Sea Robin field would have been plausible only if the agency had carefully examined the specifications of the entire pipeline system, both upstream and downstream of its designated midpoint. Indeed, FERC apparently understood this. *See Sea Robin Pipeline Co.*, Order Denying Rehearing, 92 F.E.R.C. (CCH) ¶ 61,072, at 61,291-92, 2000 WL 1100267 (2000). FERC, however, failed to make good on this understanding. The Commission claims to rely on the size of the pipes, the number of cross-connections, and the pressure of the gas in order to distinguish the lines downstream of Vermillion from those upstream. *See id.* However, none of these factors is

relevant, because not one supports the demarcation of gathering and transportation at Vermillion. On the upstream trunk legs, just as on the Vermillion-Erath line, raw highly pressurized gas is propelled over long distances through relatively wide pipes toward land. In other words, the so-called "central point" of the field is utterly irrelevant to a determination of the point where non-jurisdictional production and gathering become regulated transportation.

While the downstream, northern portion of the line may be punctuated by relatively few lateral connections (four), there are also only four laterals interrupting the final stage of the left trunk leg that runs toward Vermillion. Yet, FERC never examined whether the primary function of that upstream segment might be transportation.

FERC mentions the existence of compression at Vermillion, as if to suggest that this is a relevant consideration for purposes of comparison. It is not. The Sea Robin compressors both push and pull gas through the system, *pressurizing lines both upstream and downstream*. Indeed, in an earlier order, the Commission explicitly noted that pressure upstream of Vermillion "is similar to that of other offshore systems found to be transmission facilities." 71 F.E.R.C. at 62,402. FERC has never suggested that there is any *greater* pressure in the downstream segment. In fact, the *only* physical change that takes place at Vermillion is a marginal increase in the diameter of the pipelines heading north, which is hardly surprising in light of the fact that two upstream pipelines converge into one at the Vermillion junction. And while the pipes do get larger, the upstream trunk lines are also quite wide; indeed, the Commission's previous decisions recognize that those lines are just as compatible with transportation as the final Vermillion-Erath line. *See id.* at 62,398 ("Sea Robin's system is of the diameter and length that are more typical of an interstate transportation system rather than an exempt gathering system.").

FERC has thus asked this court to validate a determination that "gathering" ends where two large lines become one and grow proportionately wider as a result. This proposition is perplexing on its own terms, and it is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*, namely, that production and gathering entail only "the physical act[] of drawing the gas from the earth and preparing it for the first stages of distribution." 372 U.S. at 90, 83 S.Ct. at 650. The gas itself undergoes no alteration at Vermillion, nor does any event occur beyond the aggregation of gas that has already been partially aggregated, and will be further aggregated once it is processed for interstate distribution. Given these facts, there is no basis that I can discern for how the lines immediately upstream of Vermillion have as their primary function the gathering of natural gas while those immediately downstream do not.

The Commission's reclassification decision becomes positively absurd when it is considered in the light of the "Garden Banks" transportation pipeline. The Garden Banks segment of line is south (upstream) of Vermillion and it is concededly a pipeline segment that is subject to FERC's regulatory jurisdiction. *See Shell Gas Pipeline Co.*, 74 F.E.R.C. ¶ 61,277, 1996 WL 111350 (1996). Yet, as a result of FERC's reclassification of the Sea Robin system, a situation has been created in which a jurisdictional "transportation" line (Garden Banks) flows into a non-jurisdictional pipeline segment upstream of Vermillion. Not surprisingly, FERC has previously disapproved of such situations, for it is facially illogical to have gas being *transported* to where it is *gathered* only then to be *transported* again. *See Trunkline Gas Co.*, 70 F.E.R.C. ¶ 61,163, 1995 WL 58234 (1995); *Tarpon Transmission Co.*, 60 F.E.R.C. ¶ 61,041, 1992 WL 166429 (1992). The Commission offers no reasonable justification for this unseemly situation, arguing meekly that this one factor should not be considered because other factors support FERC's judgment.

This all might make sense had FERC no other serious options to consider in discharging its line-drawing responsibilities. Such was not the case, however, as the Commission had before it, and ignored, another viable division point: the offshore production platforms. In previous decisions, FERC has found such platforms to be "the central point in an offshore gas field where numerous wells are produced on the platform and raw production from other wells is transported to the platform through short flowlines." *Amerada Hess Corp.*, 47 F.E.R.C. (CCH) ¶ 61,187, at 61,623, 1989 WL 261393 (1989), *modified on reh'g on other grounds* 52 F.E.R.C. ¶ 61,268, 1990 WL 1241336 (1990).

In this case, the Commission never explained away these precedents, nor tried to justify its implicit—and by no means obvious—decision to treat the entire Sea Robin system as a single production field, with one central point, rather than as an aggregation of smaller fields, each with a central point, which in turn feed into the trunk lines for downstream transportation. This approach was presented by the gas producers below; FERC's decision to ignore it was, in my view, arbitrary and capricious. *See Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C.Cir. 1984) ("It is well established that an agency has a duty to consider reasonable alternatives to its chosen policy, and to give a reasoned explanation for its rejection of such alternatives."). Indeed, ignoring this reasonable alternative allowed the Commission to pay scant attention to the very thing that it was supposed to rely on most heavily: the physical properties of the facilities whose jurisdictional status it was endeavoring to determine.

In sum, under FERC's new legal regime, "gathering" ends where the widest pipe on a pipeline system starts and where the gas begins to flow on a direct angle to its processing plant. This approach takes insufficient account of those physical realities that might suggest a different demarcation

point between gathering and transportation, and, as applied here, led the Commission to a result that is difficult to square with the language of the statute, with the language of the Supreme Court, and with the holding (as opposed to the dicta) of the Fifth Circuit. Because the agency neither explains the discrepancy between its jurisdictional line and the one described by Congress, nor why it ignored plausible alternatives to that line, FERC is owed no deference in this case. I respectfully dissent.

BEST AVAILABLE COPY

LOUISIANA

ERATH DELIVERY POINTS

SOUTHERN NATURAL GAS CO.	0000000
HIGH ISLAND PIPELINE CO.	0047588
COLUMBIA GULF TRANSMISSION CO.	0047711
LOUISIANA RESOURCES CO.	0047713
SABINE PIPELINE CO.	0000165

CAMERON
VERMILION
IBERIA
ST. MARY
ST. MARTIN
WEST CAMERON AREA
EAST CAMERON AREA
VERMILION AREA
SOUTH MARSH ISLAND AREA NORTH ADDITION
EUGENE ISLAND AREA
SHIP SHOAL AREA
WEST CAMERON AREA SOUTH ADDITION
EAST CAMERON AREA SOUTH ADDITION
VERMILION AREA SOUTH ADDITION
SOUTH MARSH ISLAND AREA SOUTH ADDITION
EUGENE ISLAND AREA SOUTH ADDITION
GARDEN BANKS AREA
GREEN CANYON AREA

Gulf of Mexico

RECEIPT POINTS

POINT	BLOCK	POINT CODE
①	SS-285A	0047707
②	SS-285	0047708
③	SS-285	0000000
④	SS-243	0000000
⑤	SS-285	0047705
⑥	SS-285	0047706
⑦	SS-285	0047704
⑧	SS-285	0047701
⑨	SS-285	0047702
⑩	SS-285	0047703
⑪	SS-285	0047710
⑫	SS-285	0047709
⑬	SS-285	0047711
⑭	SS-285	0047712
⑮	SS-285	0047713
⑯	SS-285	0047714
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㊿	SS-285	0047748

SEA ROBIN PIPELINE
A SONAT COMPANY
GENERAL SYSTEM MAP

LEGEND

- SEA ROBIN PIPELINES
- OTHER PIPELINES
- SEA ROBIN PLATFORM
- OTHER PLATFORM
- COMPRESSOR STATION

(SCALE IN MILES)

ENGINEERING DEPARTMENT NOVEMBER 6, 1995

APPENDIX C

COMMISSION OPINIONS, ORDERS AND NOTICES

Docket No. CP95-168-003

SEA ROBIN PIPELINE COMPANY

Order Denying Rehearing
Issued July 26, 2000

Before Commissioners: James J. Hoecker, Chairman; William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

The subject of this proceeding is the jurisdictional status under the Natural Gas Act (NGA) of Sea Robin Pipeline Company (Sea Robin), an offshore natural gas pipeline system. On June 30, 1999, the Commission issued an order on remand pursuant to the instructions of the United States Court of Appeals for the Fifth Circuit (the Court) in its decision issued on October 23, 1997, in *Sea Robin Pipeline Company v. FERC* (*Sea Robin*).[1] The Commission's order on remand determined under the primary function test,[2] as reformulated in the light of the Court's decision, that the primary function of Sea Robin's facilities upstream of its Vermillion 149 Compressor Station is gathering, and that those facilities therefore are exempt from the Commission's NGA jurisdiction. The order on remand found that Sea Robin's facilities downstream of Vermillion 149 Compressor Station are properly classified as transmission.

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[1] 127 F. 3d 365 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998), *order on remand*, 87 FERC ¶ 61,384 (1999).

[2] The Commission's primary function test was articulated in *Farmland Industries, Inc.* (*Farmland*), 23 FERC ¶ 61,063 (1983).

On July 30, 1999, timely requests for rehearing of the Commission's order on remand were filed by Burlington Resources Oil & Gas Company and Exxon Company, USA (jointly as Exxon), Indicated Parties,[3] the Interstate Natural Gas Association of America (INGAA), the Producer Coalition,[4] Sea Robin Gas Pipeline Company, and Williams Gas Processing-Gulf Coast Company, L.P (Williams Gas Processing).

In this order, the Commission is affirming its findings in its order on remand that Sea Robin's facilities downstream of Vermillion 149 Compressor Station are jurisdictional interstate transmission facilities and that non-jurisdictional gathering is the primary function of Sea Robin's facilities upstream of Vermillion 149 Compressor Station, which include the east and west legs of Sea Robin's inverted-Y system.

I. Background

This proceeding was initiated on January 20, 1995, by Sea Robin's filing a petition for a Declaratory Order requesting that the entirety of its offshore system be declared non-jurisdictional gathering facilities. On June 16, 1995, the Commission issued a decision analyzing Sea Robin's under the Commission's primary function test.[5] In that order, the

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[3] Amerada Hess Corporation, Amoco Production Company, Amoco Energy Trading Corporation, Andadarko Petroleum Corporation, Marathon Oil Company, Murphy Exploration & Production Company, Phillips Petroleum Company, Shell Offshore Inc., and Texaco Natural Gas Inc.

[4] Forest Oil Corporation, Houston Exploration Company, Newfield Exploration Company, Ocean Energy, Inc., and Water, Oil & Gas Corporation.

[5] As articulated in *Farmland*, 23 FERC ¶ 61,063 (1983), the Commission's primary function test takes into consideration the following factors as relevant: (1) the length and diameter of the pipeline; (2) the extension of the facility beyond the central point in the field; (3) the pipelines' geographic configuration; (4) the location of compressors and

Commission found that all of Sea Robin's pipeline facilities were properly classified as jurisdictional transportation facilities, rather than non-jurisdictional gathering facilities as asserted by Sea Robin.[6] On October 23, 1997, the Court issued its order vacating and remanding the Commission's declaratory order.[7]

On June 30, 1999, the Commission issued its order on remand pursuant to the Court's instructions.[8] In reaching the findings in that order, the Commission acted upon the Court's instructions that the Commission either: (1) could reapply the existing primary function test to the facts and circumstances of Sea Robin's facilities in the light of the Court's opinion; or (2) re-evaluate and, if necessary, reformulate the primary function test.[9]

In accordance with the Court's instructions, the Commission's order on remand articulated and applied a reformulated primary function test to determine the jurisdictional status of

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processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the line. The primary function test has been found by the Commission to be applicable to both onshore and offshore facilities, as modified and applied to offshore facilities in *Amerada Hess Corporation*, 52 FERC ¶ 61,268 (1990), and now as further modified with respect to offshore facilities in the Commission's order on remand in this *Sea Robin Pipeline Company proceeding*, 87 FERC ¶ 61,384 (1999). The criteria set out in Farmland were not intended to be all inclusive. The Commission has also considered nonphysical criteria such as the intended purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and the NGPA.

[6] *Sea Robin Pipeline Company*, 71 FERC ¶ 61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996).

[7] *Sea Robin Pipeline Company v. FERC*, 127 F. 3d 365 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998).

[8] 87 FERC ¶ 61,384 (1999).

[9] 127 F.3d. at 371.

Sea Robin's facilities. The result was the jurisdictional determination that gathering on Sea Robin's system ends at the Vermillion 149 Compressor Station and, therefore, only the Sea Robin facilities upstream of that point are exempt from the Commission's NGA jurisdiction. In arriving at that conclusion, the order on remand followed the Court's suggestion that the demarcation point between gathering and transmission on a system like Sea Robin's could be determined to be at a point internal to an overall pipeline system (here, the Vermillion 149 Compressor Station).[10]

As articulated and applied by the Commission in the order on remand, the primary function test is reformulated: (1) by the adoption of an additional analytical element that will be applicable to Outer Continental Shelf (OCS) pipeline facilities that Exhibit a particular physical design feature—*i.e.*, a centralized aggregation point; (2) by adjusting the weight to be afforded the primary function test's "behind-the-plant" criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors; and (3) to focus primarily on physical factors. As discussed in the order on remand, the reformulated aspects of the primary function test are relevant to identifying physical characteristics distinguishing gathering from transportation in the offshore context.

II. Rehearing Requests

Sea Robin, INGAA and Williams Gas Processing argue in their rehearing requests that Sea Robin's entire system should be declared a non-jurisdictional gathering system. Exxon, Indicated Parties and the Producer Coalition (collectively "the Producer Groups") argue in their rehearing requests that the entirety of Sea Robin's system should be found a jurisdictional transmission system.

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[10] *Id.*

A. *The Producer Groups*

Generally, the Producer Groups contend that the new "centralized aggregation point" criterion has no relationship to the demarcation between gathering and transportation on offshore pipeline systems. The Producer Groups argue that the order on remand presents no record support for the need for this new test and otherwise fails to state any reason to justify the Commission's departure from prior precedent. The Producer Groups maintain the order on remand principally relied on the new factor based on a centralized aggregation point, and that it thus represents a mechanical application of a single bright line test, forbidden by the courts. The Producer Groups also claim that the adoption of the centralized aggregation point as a new factor ignore's the Court's invitation to adopt an OCS specific gathering/transportation test, seizing instead on the expedient of dividing Sea Robin based upon dicta in the court's opinion.

The Producer Groups claim that as a result of mechanically applying the centralized-aggregation-point factor, the June Order on remand declared, without analysis, huge portions of Sea Robin's system—everything upstream of the Vermillion 149 Compressor Station—to be engaged in gathering simply because they are located upstream of the last fork in the system. Accordingly, the Producer Groups maintain, the application of the centralized-aggregation-point factor is not consistent with the Supreme Court's admonition to narrowly construe the gathering exemption.[11]

Reliance on a centralized aggregation point is contrary, the Producers Groups believe, to the Supreme Court's explanation that "gathering" is narrowly confined to "the physical acts of drawing gas from the earth and preparing it for the

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[11] *Citing Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 418 (1986); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690-91 (1947).

first stages of distribution."[12] They state that offshore, such preparation occurs on the production platform. The Producer Groups further maintain that, aside from the issue of whether it is appropriate to base jurisdictional determinations on the existence of a centralized aggregation point, the physical characteristics of the facilities upstream of Sea Robin's Vermillion 149 Compressor Station do not support a determination that those facilities perform a gathering function.

The Producer Groups also find fault with the order on remand on grounds that it fails to consider the non-physical factors relevant to Sea Robin (*e.g.*, general business purpose, prior certification, location of free water removal). They contend that in Sea Robin's case analysis of such non-physical factors indicates a transmission function for the entirety of Sea Robin's facilities. They further assert that while the Court in its remand order may have been concerned that the Commission gave too much consideration to non-physical factors in its prior orders, the Commission's order on remand ignores them entirely.

Similarly, the Producer Groups argue that the order on remand also ignores the integrated nature of Sea Robin's entire system. They claim that Sea Robin's system was designed as an integrated system to transport gas received from 71 producing areas to the onshore. The Producer Groups emphasize that the Commission has allowed Sea Robin rolled-in rate treatment for the costs of all of its facilities in the development of its existing postage stamp rates. This, they argue, demonstrates that the Commission has found that Sea Robin's system is fully integrated. They assert that the Commission can not retract such findings absent a showing of a change in Sea Robin's operations.

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[12] *Citing Northern Natural Gas Co. v. State Corp. Comm'n.*, 372 US 84, 89-90 (1963).

The Producer Groups also present the argument that the Commission's interpretation of gathering is overly broad and, being so, disregards Congressional intent by creating an unlawful regulatory gap and by failing to consider the adverse impact on consumers and producers of "decertificating" large portions of the existing OCS transportation grid.

Also, the Producer Groups claim that the order on remand unlawfully rescinded a portion of Sea Robin's certificates because it failed to first consider the public interest, Sea Robin's market power, competitive impacts and other factors relevant in determining whether such a result was permitted by the present and future public convenience. For this reason, the Producer Groups maintain that the recission of certification constitutes an impermissible *de facto* abandonment.

The Producer Groups criticize the order on remand because, in their view, the order failed to eliminate from the offshore primary function test the behind-the-plant and line-pressure factors. They maintain that these considerations are irrelevant to distinguishing between gathering and transmission on the OCS. Exxon, in particular, offers the argument that the Commission erred in failing to adopt an OCS gathering/transportation test that uses appropriate analytical tools.[13]

Among the Producer Groups, Indicated Parties' rehearing request introduces into the record for the first time a new fact relating to Garden Banks Gas Pipeline, L.L.C. (Garden Banks). Specifically, the Indicated Parties note that since the

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[13] Among the Producer Groups, Exxon offers as an alternative the following test: (1) facilities lying in water depths of 200+ meters are presumptively gathering up to the point of proximity to the established transportation grid; (2) at water depths less than 200 meters, facilities downstream of a "central platform in the field" are presumptively transportation facilities; and (3) for existing facilities, the current jurisdictional classifications govern the status of those facilities, absent demonstration that such classification was clearly erroneous.

issuance of the Commission's remanded 1995 Declaratory Order finding all of Sea Robin's facilities to be jurisdictional, Garden Banks has interconnected its jurisdictional pipeline with the east leg of Sea Robin's system in South Marsh Island Block 128. The Indicated Parties emphasize that this development has not been considered by the Commission in its prior orders in this proceeding.

In view of Sea Robin's interconnection with Garden Banks' interstate system, the Indicated Parties cite the Commission's consistent rulings in other cases that two interstate pipelines, each providing interstate transportation service, cannot be connected together by means of a non-jurisdictional gathering line.[14] Therefore, the Indicated Parties argue that, in addition to Sea Robin's facilities downstream of Vermillion 149 Compressor Station, at least that portion of the east leg of Sea Robin's inverted-Y system between the Vermilion 149 Compressor Station and the interconnection with Garden Banks also must remain classified as jurisdictional transmission facilities.

The Producer Groups also challenge the order on remand by claiming that it disregards their due process rights by failing to make any reference to, or identify any reliance on, the record generated in the Commission's Notice of Inquiry in Docket No. RM98-8-000.[15] Alternatively, these parties claim that if the Commission did not rely on the record in Docket No. RM98-8-000, the Commission must be faulted for having made no attempt in the instant docket to institute

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[14] *See, e.g., Tarpon Transmission Co.*, 60 FERC ¶ 61,041, at p. 61,150 *reh'g denied*, 61 FERC ¶ 61,249 (1992), *on reconsideration on other grounds*, 78 FERC ¶ 61,278 (1997).

[15] *Notice of Inquiry, Alternative Methods for Regulating Natural Gas Pipeline Facilities and Services on the Outer Continental Shelf*, 63 Fed. Reg. 30,675 (June 1, 1998).

proceedings and develop a record that reflects the views of the parties on how best to proceed in accordance with the Court's remand.

The Producer Coalition, in particular, asserts that the inquiry proceeding in Docket No RM98-8-000 was a "proxy" for developing a record on remand in this proceeding and was so understood by the parties. The Producer Coalition contends that having requested comments in Docket No. RM98-8-000 in lieu of establishing a briefing schedule in this docket, the Commission does not have the prerogative to ignore the comments filed in response to the Notice of Inquiry. The Producer Coalition believes the comments it filed in Docket No. RM98-8-000 presented specific evidence of Congressional intent on the issue of what constitutes gathering on the OCS. Therefore, if the Commission fails to consider that evidence in this proceeding, the Producer Coalition believe such failure would constitute a lack of reasoned decision-making.

Respecting the legislative history of the Outer Continental Shelf Lands Act (OCSLA), the Producer Coalition argues that the reformulated primary function test set forth by the order on remand will permit natural monopolists unfettered market power over essential facilities on the OCS, contrary to express Congressional intent regarding gathering operations on the OCS. The Producer Coalition states that there is no indication in the legislative history of the OCSLA, or its amendments, that Congress intended to exempt from the NGA any portion of the flow of gas across the OCS. On the basis of this assertion, the Producer Coalition further avers that the test articulated in the order on remand, by exempting a significant amount of OCS pipeline facilities from the NGA, runs counter to the Congressional purpose underlying the NGA of creating a comprehensive regulatory scheme, in which federal and state regulation would complement each other.

The Producer Coalition further maintains that the order on remand fails to reflect Congressional intent expressed in the OCSLA as to what constitutes gathering on the OCS. In the view of the Producer Coalition, this intent was incorporated in the OCSLA's definition of "feeder lines."[16] Under the Producer Coalition's theory, gathering on the OCS properly is limited to the movement of gas from the wellhead through the point where it is first collected, separated or dehydrated on an OCS platform in preparation for injection into a pipeline for transportation to shore. In support of that position, the Producer Coalition contends that the OCSLA's legislative history—in particular, the Committee reports and floor debates—clearly show that only those lines defined as "feeder lines" were intended to be the functional equivalent of NGA gathering lines and that the OCSLA open-access requirements[17] were intended to supplement, not replace, NGA regulation on the OCS.

Since the Producer Coalition believes that defining offshore gathering facilities so as to exclude anything other than "feeder lines" would be consistent with Congressional intent and the OCSLA, the Producer Coalition argues that the Commission should adopt this definition and give it significant weight in making jurisdiction jurisdictional determinations under the NGA regarding OCS facilities. The Producer Coalition stresses that under its test, Sea Robin's entire system would be classified as a jurisdictional transportation system.

The Producer Groups argue that until issuance of the order on remand, producers and pipelines understood that the existing OCS interstate pipeline grid was subject to NGA regulation and thus they could plan their own operations on that basis. Now, they believe the order on remand jeopardizes

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[16] 43 U.S.C. § 1334(f)(10).

[17] 43 U.S.C. § 1334(f)(2).

that regulatory and relative price certainty and the planning and construction of deepwater facilities undertaken based on that assurance. Thus, they assert the order on remand will affect adversely not only Sea Robin's existing customers but the entire OCS interstate pipeline grid, as well as the development of new upstream deepwater systems.

In view of the potential changes in the jurisdictional status of OCS pipelines, the Producer Groups claim that the reformulated primary function test will hamper the Commission's objective in the OCS Policy Statement[18] of fostering the orderly development of deepwater reserves by permitting new deepwater pipelines to be constructed to connect with the existing OCS interstate pipeline grid. The Indicated Parties state that approximately 7,000-8,000 miles of presently jurisdictional facilities offshore could be declared non-jurisdictional as a result of the revised test in the order on remand.

B. *The Pipelines*

INGAA and Sea Robin argue that the order on remand unlawfully diminishes the significance of the behind-the-plant test by failing to adequately explain the legal and factual basis for departing from the past practice of its being given significant, if not determinative, weight. INGAA emphasizes that the Commission has utilized the behind-the-plant factor as being indicative of a gathering function in numerous offshore cases since 1980.[19] In addition, INGAA contends

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[18] *Statement of Policy, Gas Pipeline Facilities on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, 74 FERC ¶ 61,222 (1996).

[19] *Citing Superior Oil Company*, 13 FERC ¶ 61,218, at pp. 61,495-96 (1980); *Exxon Corp.*, 45 FERC ¶ 61,436, at p. 62,390 (1988); *Mobil Oil Exploration & Producing Southeast, Inc.*, 46 FERC ¶ 61,014, at p. 61,096 (1989); *Shell Offshore, Inc.*, 46 FERC ¶ 61,228, at p. 61,688 (1989); *Hall-Houston Oil Co.*, 46 FERC ¶ 61,233, at pp. 61,698-99 (1989); *Blue*

that the order fails to take into account the Court's observation that the quality of gas in particular facilities is relevant to whether those facilities are engaged in gathering, rather than transmission. Sea Robin and INGAA further contend that the location of processing plants is important because in most cases unprocessed gas will not meet the specifications for transportation by pipelines making interstate deliveries.

Sea Robin emphasizes that it delivers gas that cannot be transported further in interstate commerce until it has been processed. Sea Robin claims that this fact is a determinative indication of a gathering function. Sea Robin maintains that discounting the behind-the-plant factor is contrary to the Court's instruction that the Commission must not discount, without reasoned analysis, application of any factor which points to a non-jurisdictional result. Respecting the relevance of the behind-the-plant test on the OCS as a demarcation point versus its application onshore, Sea Robin claims that it is not the configuration of the facilities that is different; it is the distance and size of the facilities offshore that are different.

INGAA, and Williams Gas Processing maintain that Sea Robin's entire system is properly classified as a non-jurisdictional gathering facility because it meets all six factors of the primary function test as applied by the court in *EP Operating v. FERC* (*EP Operating*).[20] Williams Gas Processing advances the contention that the order on remand erred in not finding that all of Sea Robin's facilities constitute gathering by failing to apply the governing standard, *i e.*, the

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Dolphin Pipe Line Co., 58 FERC ¶ 61,103, at pp. 61,362-63 (1992); *TOMCAT*, 59 FERC ¶ 61,340, at pp. 62,239-40 (1992); *Pacific Offshore Pipeline Co.*, 64 FERC ¶ 61,167, at p. 62,509 (1993); *Viosca Knoll Gathering System*, 66 FERC ¶ 61,237, at pp. 61,579-80 (1994); and *Superior Offshore Pipeline Co.*, 67 FERC ¶ 61,253, at pp. 61,834-35 (1994).

[20] 876 F.2d 46 (Fifth Cir. 1989).

"sliding-scale" of the modified primary function test. Williams and Sea Robin also maintain that the order on remand failed to adhere to the Court's finding in *Sea Robin* that the efficiencies associated with moving large volumes of gas to shore may require the use of long-length and large-diameter pipeline.

Williams Gas Processing especially makes note of the contention that the downstream, shore-connecting stem of Sea Robin's inverted-Y system is an integral part of Sea Robin's integrated collection system. Williams states that the stem of the inverted-Y system is the functional equivalent of the facilities found to be non-jurisdictional in *EP Operating*. According to Williams Gas Processing's view, rather than building a number of smaller-diameter lines, as EP-Operating did, to reach from numerous offshore gas fields and ultimately converge upon a single point onshore for processing, Sea Robin opted for a more practical design.

Williams avers that if Sea Robin, like EP Operating, had constructed a system of smaller-diameter lines, each separate line would have clearly qualified as gathering because: (1) the physical dimensions of each line would reflect the needs and location of a particular field; and (2) the central point would be the onshore processing plant where the radial lines converged. Arguing that Sea Robin's configuration is both functionally equivalent and superior to a converging radial system, Williams Gas Processing asserts that it defies logic that prudent pipeline planning that uses a more economic, more efficient, and more environmentally sensitive inverted-Y configuration should lose its gathering status.

Sea Robin and Williams Gas Processing also argue that the compression on Sea Robin's system is an integral part of the offshore gathering process because it is a function of the quality of the raw, dual-phase stream flowing through the system and is necessary not only to push the gas to shore but also to pull it from the production areas. In this regard,

Williams Gas Processing asserts that the jurisdictional determination in the order on remand cannot be reconciled with orders declaring similar facilities to be exempt gathering facilities. Sea Robin argues that the compression at its Vermillion 149 Compressor Station is consistent with the function of field compression because it both maintains the pressure on the east and west legs upstream and restores the pressure of gas gathered through those legs downstream. Sea Robin cites a case involving onshore facilities in which the Commission found a compressor station three times as large as Vermillion 149 to be gathering based on its location behind a processing plant and its purpose of pushing gas for delivery into the interstate market.[21]

Sea Robin argues that the order on remand violates the principles set forth by the Court in its remand order in that, rather than looking at the totality of the circumstances, the Commission focused on one factor, the centralized aggregation point, of the reformulated primary function test and chose to weigh its decision in favor of that factor, while substantially discounting other factors that would had led to a finding of gathering. Sea Robin further contends that the Commission's new reliance on the centralized-aggregation-point criterion is an arbitrary revitalization of the central-point-in-the-field factor that the Commission had in prior cases determined to be of little utility in analyzing offshore facilities.

Sea Robin desires the factors of the primary function test to be applied in order to achieve a finding of gathering for the entirety of its system. Sea Robin argues the sole purpose of the 36-inch diameter stem of its inverted-Y system, a line which runs from the Vermillion 149 Compressor Station to the onshore Erath Compressor Station (Vermillion 149-Erath Line), is to deliver non-pipeline quality gas collected from 67

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[21] *Citing El Paso Natural Gas Company*, 82 FERC ¶ 61,337 (1998).

offshore platforms to onshore processing plants. Sea Robin contends that splitting its overall system at the Vermillion 149 Compressor Station draws an arbitrary line that has nothing to do with the function of the facilities and everything to do with the size of the facilities on either side of that location.

In support of its position, Sea Robin claims that, notwithstanding the larger diameter of the 36-inch Vermillion 149-Erath Line, the purpose of that line is gathering, the same as its system's east and west legs upstream of the Vermillion 149 Compressor Station. Sea Robin emphasizes that no deliveries of gas are made off of the Vermillion 149-Erath Line to other pipelines. Sea Robin further argues that a significant indicator of the Vermillion 149-Erath Line's gathering function is the fact that there are five gas receipt points on the line. Sea Robin stresses that one of these receipt points is as far north as Vermillion Bay and that north of that receipt point, the line enters an environmentally protected area.

III. Discussion

A. *The Reformulated Primary Function Test is Consistent with the Court's Instructions*

The Commission disagrees with the petitioner's assertions, both those arguing for a jurisdictional test that would include more OCS facilities within the definition of "gathering facilities," and those that contend that the test adopted in the order on remand will encompass unjustifiably too few facilities within that class. Contrary to the contentions of the petitioners for rehearing, the order on remand is fully in accord with the instructions of the Court. As discussed above, the Court's *Sea Robin* opinion gave the Commission two options: the Commission could either: (1) reapply the existing primary function test in the light of the Court's opinion; or (2) re-evaluate and, if necessary, reformulate the primary function test. The Commission chose to follow the latter course of

action. Specifically, the Commission applied a reformulation of the primary function test in determining that gathering on Sea Robin's system ends at the Vermillion 149 Compressor Station.

The reformulated aspects of the primary function test that were articulated and applied in the order on remand are: (1) the adoption of an additional analytical element applicable to OCS pipeline facilities that exhibit a particular physical design feature—*i.e.*, a "centralized aggregation point"—which, while not the determinative factor, will be given weight in applicable cases "in identifying the demarcation point between gathering and transportation on OCS pipeline systems;"[22] (2) an adjustment in the weight to be afforded the behind-the-plant criterion, the result of which is that the location of processing plants on the OCS will not necessarily be a determinative factor, but rather can be outweighed by other factors[23] and; (3) a primary focus on physical factors.[24]

1. *The Reformulated Test is Based on Physical Factors Relevant to the OCS*

The petitioners argue that the Commission failed to follow the Court's direction that the Commission must ground its primary function test and base its determination on physical factors that are relevant to determining where gathering ends on the OCS. The Commission believes it has followed these directions, since the order on remand reformulated the primary function test for use as an OCS-specific test by adapting the onshore behind-the-plant and central-point-in-the field criteria to the offshore context. The reformulated and additional elements of the reformulated primary function test

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[22] 87 FERC at p. 62,426.

[23] *Id.*

[24] *Id.*

are reasonably relevant to identifying the physical characteristics distinguishing gathering from transportation on the OCS.

The Commission's reasons for the specific departures from the former primary function test were explained in the order on remand. First, the Commission briefly set out the history of the evolution of the primary function test in the onshore and offshore contexts. Then, as has been done in prior orders in this proceeding, the Commission again took official notice of the basic, reality-driven fact that, when dealing with offshore systems, the Commission generally cannot rely, as it often has when analyzing onshore systems, on the processing plant tailgate as the demarcation point between gathering and jurisdictional transmission. It has never been the subject of serious dispute at any point in the history of this case that the offshore realities of production-related economic, operational, and engineering factors preclude completion of gas processing close to the producing areas. Indeed, in the case several petitioners rely on in criticizing the Commission's order on remand—*EP Operating*—the Court acknowledged this abundantly clear physical and economic fact of life on the offshore.[25]

Respecting the new element of the centralized aggregation point, the order on remand did little more than recognize that the Vermillion 149 Compressor Station, when viewed within the guidelines established by the Court, is the point within Sea Robin's overall system that demarcates where the collection process is completed and where gas is aggregated at a narrowly confined location, compressed, and thereby propelled into a relatively much larger mainline for transmission into the onshore pipeline grid. In the order on remand, the factors analyzed, the Commission's assessment of those factors, and the result are responsive to the Court's

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[25] *EP Operating v. FERC*, 876 F . 2d. 46, 49 (Fifth Cir. 1989).

observation that, while the task in a case such as the instant proceeding may be difficult, the Commission must squarely address the fact that the demarcation point between gathering and transmission on a system like Sea Robin's may be located at a point internal to the overall system (here, the Vermillion 149 Compressor Station).[26]

The order on remand further explained that the centralized-aggregation-point criterion is analogous to the central-point-in-the-field criterion as that concept has been applied in the onshore context. Given the Court's directions and guidelines for determining at what point gathering ends, the coincidence of several smaller lines at a centralized location where the gas carried is delivered into a single, larger-diameter line for further delivery to market is the most logical point to place that demarcation point.

2. *The Justification for Reformulating the Primary Function Test*

In view of the emphasis placed by the Court on its instructions and the Commission's efforts to adhere to that guidance in the order on remand, the Commission cannot agree with the petitioners' argument that the order on remand failed to state any reason to justify the departure from prior precedent and that it presented no record support for the need for the new test. The Court rejected the Commission's existing method of applying the primary function test to Sea Robin's facilities. The Court gave the Commission the option of re-evaluating and reformulating the existing primary function test.

3. *Physical vs. Non-Physical Factors*

The Commission also finds unpersuasive the pipelines' argument that the order on remand is flawed because it failed to consider or did not give sufficient weight in the analysis of

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[26] 127 F. 3d at 371.

Sea Robin's system to non-physical factors that would be indicative of a transmission function for the entirety of Sea Robin's facilities. In reaching findings in our order on remand, we considered, as the Court directed, all relevant factors, including non-physical factors. We took into account Sea Robin's position as to its general business purpose, the Commission's prior certification of Sea Robin's entire system, and location of free water removal on Sea Robin's system.

However, the Court was clear in its ruling that the Commission's analysis and any reformulation of the primary function test must result in jurisdictional findings that are not inconsistent with the physical characteristics of offshore systems.[27] Thus, while the non-physical factors pertinent to Sea Robin have been set out at length in the Commission's prior orders in this proceeding, those non-physical factors could not be given more weight than the relevant physical factors in the Commission's analysis in the order on remand.

B. *The Commission Properly Applied the Reformulated Primary Function Test to Sea Robin's System*

1. *The Factors Considered in this Case*

The Court instructed the Commission not to base a jurisdictional finding on any one factor, *e.g.*, the size of the system.[28] Rather, the Commission must consider all of the factors that it determines are relevant.[29] In compliance with this instruction, the order on remand considered the totality of the relevant circumstances in assessing Sea Robin's system by considering all of the relevant physical aspects of the reformulated primary function test.

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[27] *Id.*

[28] 127 F. 3d At 365.

[29] 127 F. 3d at 371.

The foundation of the jurisdictional determination in the order on remand (*i.e.*, that the facilities upstream of Vermillion 149 are non-jurisdictional gathering facilities) was an examination and weighing by the Commission of the following relevant, physical factors:

(1) the 66.3 mile length of the Vermillion—Earth line;

(2) the 36-inch diameter of the Vermillion—Earth Line;

(3) the straight-line configuration of the Vermillion—Earth line;

(4) the inverted-Y configuration of the Sea Robin System;

(5) the existence of only four platforms along the length of the Vermillion—Earth Line as compared to the connections to 71 production platforms upstream of the Vermillion 149 Compressor Station;

(6) the abrupt change in physical attributes and configuration in the system occurring at the Vermillion 149 Compressor Station;

(7) the concentration of compression at the Vermillion 149 Compressor Station;

(8) the existence of a centralized aggregation location at the Vermillion 149 Compressor Station;

(9) the 4.5″—24″ diameters of the lines upstream of the Vermillion 149 Compressor Station;

(10) the existence of 45 laterals feeding into the two upstream arms of the inverted-Y upstream of the Vermillion 149 Compressor station;

(11) the presence of 71 production platforms connected to the system upstream of the Vermillion 149 Compressor station;

(12) the network configuration of Sea Robin's facilities upstream of the Vermillion 149 Compressor Station; and

(13) the onshore location of processing plants, which was not considered a determinative factor due to the geographic and technical characteristic of production and transportation offshore

2. *The Centralized Aggregation Point*

Several of the petitioners specifically criticize the new centralized-aggregation-point factor as being a "stand-in" for what they refer to as the Commission's prior reliance on the "unspoken sole-factor" test of size alone. This misapprehends the meaning and significance of the new factor. The new central-aggregation-point factor is not a sole-criterion, "bright-line" test. Rather, the centralized-aggregation-point is more appropriately viewed as a descriptive label for a set of a number of individual physical characteristics.

In other words, prior to the Commission's finding that the Vermillion 149 Compressor Station functions as a location within Sea Robin's overall system where natural gas is aggregated at a centralized point, the Commission first examined and assessed several physical characteristics. Specifically, the Commission's conclusion that the Vermillion 149 Compressor Station is properly viewed as the "centralized aggregation point" was based on a review of the following physical indicators, each of which individually are indicative of a gathering function on Sea Robin's system upstream of the Vermillion 149 station:

(1) the length and diameter of the line downstream of the Vermillion 149 Compressor Station;

(2) the number of lines and platform connections upstream of the Vermillion 149 Compressor Station;

(3) the length and diameter of the downstream line in comparison to the length and diameters of the lines upstream of the Vermillion 149 Compressor Station;

(4) the existence of few wells downstream of the Vermillion 149 Compressor Station in comparison to the number of wells upstream of the Vermillion 149 Compressor Station;

(5) a network-type configuration upstream of the Vermillion 149 Compressor Station; and

(6) the presence of compression at the Vermillion 149 Compressor Station which functions to move gas to shore.

The combination of the specific physical attributes of the above individual factors on Sea Robin's system comprises an additional factor, which was also given weight in determining the system's jurisdictional status. Just as the historical behind-the-plant and central-point-in-the-field factors are based on the existence of a confluence of individual elements, the new centralized-aggregation-point factor also is an example of an additional physical factor that can arise as the result of the combination of several individual physical components, such as the above-described characteristics of Sea Robin's system.

Moreover, not only are the petitioners' arguments based upon an incorrect understanding of the significance of a centralized aggregation point, but they also miss the fact that the Commission's order on remand also considered, independently of the individual physical elements included under the umbrella of that concept, the totality of the relevant circumstances in assessing Sea Robin's system. As discussed above, in addition to finding that a centralized aggregation point exists internally within Sea Robin's system, the order on

remand considered all of the relevant physical aspects of the primary function test.

In view of the above, the Commission also finds little merit in the petitioners' argument that the order on remand simply declared, without analysis, portions of Sea Robin's system to be engaged in gathering simply because they are upstream of the last fork in the system. Rather, as noted above, in making the Commission's jurisdictional determination, the order as remand, as a prerequisite to finding the presence of a centralized aggregation location, considered the configuration, physical specifications, and function of the facilities upstream of the Vermillion 149 Compressor Station.

Similarly, the result of the Commission's application of the reformulated primary function test in this case is not contrary to the concept that "gathering is narrowly confined to the physical acts of drawing gas from the ground and preparing it for the first stages of distribution." The Court based its decision in part upon a recognition of that definition[30] and the Commission's order on remand is in accord with the instructions of the Court. Nowhere in the Court's opinion is it even suggested that the appropriate point of demarcation between gathering and transportation is at the production platform, as some of the petitioners advocate.

As for the opposite argument by other petitioners, a fair reading of the Court's opinion is that it rejected any notion that all of Sea Robin's facilities downstream of the production platforms with which its various segments interconnect are transmission facilities. Further, any and all arguments that the entirety of Sea Robin's system is jurisdictional have been exhausted and addressed by the Commission in its prior orders in this proceeding. Under the primary function test, as reformulated and applied in the order on remand, preparation of OCS gas for the first stages of distribution occurs at the

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[30] 127 F. 3d at 368.

Vermilion 149 Compressor Station where the gas collected from the multitude of upstream facilities is aggregated and injected into the large diameter Vermillion—Erath Line for transportation into the onshore interstate pipeline grid.

3. *The Integrated Design of Sea Robin's System*

The pipelines' argument that the order on remand erred because it did not take into consideration the "integrated nature" of Sea Robin's entire system is not compelling. Their argument is that the entire system is "integrated" because it [sic] the entire system is necessary to transport gas received from the 71 accessed producing areas to the onshore. Even if the Commission were to accept this "integrated" characterization of the design of Sea Robin's system, to find the entirety of Sea Robin's system is gathering on this basis would violate the Court's conceptualization that, to be consistent with Congressional intent, the Commission must draw the jurisdictional lines, even when the end of gathering is not easily located as, for example, when it occurs at a point internal to an overall system.

Nor is the Commission's jurisdictional determination influenced by the Producer Groups' contrary argument that Sea Robin's entire system should be found gathering on the grounds that the Commission approved rolled-in rate treatment for the costs of all of Sea Robin's facilities in the development of its existing postage stamp rates while the system was operated as a transmission facility. It is true that rate considerations have been raised aggressively in some of the proceedings in recent years in which interstate pipelines were spinning down to affiliates or spinning off to third parties their gathering facilities in response to the Commission's policies requiring pipelines to unbundle their transmission and gathering services and offer them under separately state rates. Some parties tried to couch their rate concerns as "jurisdictional" issues. However, while a pro-

ceeding to review jurisdictional status may lead to reallocation of costs, the Commission's prior rate treatment does not dictate where gathering ends on a particular system.

4. *Regulatory Gap*

The Commission does not agree with the Producer Groups' argument that the reformulated primary function test is overly broad because it will create an unlawful regulatory gap on the OCS. First, the Commission notes that the Court specifically rejected arguments based on those grounds.[31] Further, the Producer Groups' concerns are being addressed by the Commission's exercising its authority under the OCSLA, which gives the Commission sufficient authority over non-NGA jurisdictional pipelines to assure that regulatory goals are achieved.

Concurrently with this order, the Commission is issuing an order on rehearing of its final rule, Order No. 639,[32] in Docket No. RM99-5-000, which affirms the Commission's decision to promulgate regulations under the OCSLA to ensure that natural gas is transported on an open and nondiscriminatory basis by all gas service providers operating in the OCS. Order No. 639's regulations require OCS service providers to make available information regarding their affiliations and the conditions under which service is rendered. This information will assist the Commission and interested persons in determining whether OCS service providers pipelines are conforming with the open access and nondiscrimination mandates of the OCSLA and will enable shippers who believe they are being subjected to anticompetitive practices to bring their concerns to the Commission. The transactional transparency that reporting will bring should provide a sound basis

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[31] 127 F.3d at 371.

[32] 65 *Fed. Reg.* 20354 (April 17, 2000), *FERC Statutes and Regulations* ¶ 31,097.

for implementing the open and nondiscrimination access mandates of the OCSLA and produce greater efficiencies in the marketplace.

5. *The Procedures Followed*

The Commission disagrees with the arguments of the petitioners that the order on remand in some way violates their due process rights. The choice between proceeding by a general rulemaking proceeding or by an *ad hoc* adjudicative decision is one that lies primarily in the informed discretion of the Commission.[33] Here, rather than proceeding by way of a rulemaking based on comments received in response to the Commission's Notice of Inquiry in Docket No. RM98-8-000, the Commission exercised its administrative option to proceed by rendering a decision in the existing case-specific Sea Robin docket. Further, none of the petitioners has shown any harm that resulted because the Commission decided to articulate its reformulation of the primary function test in this remand proceeding, rather than by further action in the inquiry proceeding. The order on remand was based on the record in this proceeding; there was no requirement that the Commission rely on the record compiled in another proceeding to reach its decision here.

6. *The Impact of the Application of the Reformulated Test*

The Producer Groups claim that the existing interstate pipeline grid will be adversely impacted by the order, and that Sea Robin's existing customers, as well as new upstream deepwater systems, will be adversely affected. In addition, they assert that the order on remand will impact the Com-

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[33] *See, e.g., Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194 (1947).

mission's OCS Policy Statement[34] because the jurisdictional status of OCS pipelines that are part of the interstate pipeline grid will change.

The Commission is mindful, of course, of the impacts that may follow from its finding in the order on remand that the certificated, upstream east and west legs of Sea Robin's system are non-jurisdictional gathering facilities. Over the course of the past several years, shippers have raised concerns in numerous proceedings regarding potential rate impacts and other considerations affecting their continued access to facilities that have been reclassified from transmission to gathering. However, the issue before us in this case is a matter of jurisdiction and statutory interpretation. The remanding Court's directions on this point were clear. The Court ruled that while the practical effect of the determination of gathering is relevant, the primary consideration in formulating a jurisdictional test must be the physical characteristics that distinguish gathering from transmission.[35]

Thus, in preparing the order on remand, the Commission carefully analyzed Sea Robin's system and found that the Vermillion 149 Compressor Station serves as a central aggregation point for gas supplies gathered from production areas. The Commission concluded that a central-aggregation-point factor was an appropriate additional factor for consideration in offshore cases since, consistent with the Court's instructions and guidance, it permits the Commission to ascertain more readily the functional confluence of numerous individual physical characteristics, including the relative number of lines and platform connections upstream of a potential

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[34] *Gas Pipeline Facilities and Services on the Outer Continental Shelf-Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, Docket No. RM96-5-000, *Statement of Policy*, 74 FERC ¶ 61,222 (1996).

[35] 127 F.3d. at 371.

jurisdictional demarcation point on a system; the relative length and diameter of pipe upstream of the point; the number of wells accessed upstream of the point; network-type configuration upstream of the point; and the presence at that point of compression which functions to move gas to shore.

C. *The Legislative History of the OCSLA*

The Commission also rejects the argument that, as a result of the enactment of the 1978 amendments to the OCSLA, the Commission must adopt a "feeder line" definition of "gathering."[36] Under this theory, the entirety of Sea Robin's system would be classified as transmission. The petitioners' theory is legally deficient. First, there is no definition of "gathering" in the OCSLA. While the OCSLA does include a concept of "feeder lines,"[37] that is a concept that is unique to the OCSLA for purposes of defining those OCS pipeline facilities that the Commission may exempt from the provisions of the OCSLA. There is no indication whatsoever in the statute that the Congress intended for the Commission to adopt the OCSLA "feeder-line" definition for purposes of determining what facilities are exempt from the NGA under the "gathering" exemption contained in Section 1(b)n of the NGA. In fact, nowhere in the OCSLA is the term "gathering" found.

The line of cases that the petitioners rely on for this contention is not supportive. For example, in the case primarily relied on by the Producer Coalition,[38] the legislative history of a statue that was relied on was evidence relating to subsequent amendments to the statute at issue in the case. The other cited cases also involved legislative history of laws and subsequent amendments to those laws or the legislative

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[36] 43 U.S.C. § 1334(f)(2).

[37] *Id.*

[38] *See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980).

history relied on at least included some specific Congressional references to the relevant provisions of the law being interpreted. Thus, those cases provide no support for using references to "gathering" in the legislative history of the OCSLA in order to define "gathering" for purposes of 1(b) of the NGA. Additionally, when dealing with "isolated excerpts" from legislative history, it is contrary to "the guidance of the courts to presume general congressional awareness" of construction based only on a few isolated statements in thousands of pages of legislative documents.[39] "Language in a Committee report, without additional indication of more widespread congressional awareness, is simply not sufficient."[40]

D. *The Recission of Sea Robin's Certificates*

The Commission disagrees with the contentions of the Producer Groups that the recission of the pertinent certificates of public convenience and necessity that had been issued to Sea Robin at various points in the development of its system constitutes an impermissible *de facto* abandonment. The Producer Groups assert that these certificates must be an abandoned pursuant to the full panoply of public interest standards applicable under an abandonment of jurisdictional facilities under Section 7(b) of the NGA. Producer Groups maintain the June 30 Order falls short of this task. The Producer Groups note that Order No. 509 issued every certificated OCS pipeline, including Sea Robin, a blanket transportation certificate under Subpart G of Part 284 and made clear that such certificates could be abandoned only with explicit Commission approval under 7 (b) of NGA. In

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[39] *Securities and Exchange Commission v. Samuel H. Sloan*, 436 U.S. 103 (1978).

[40] *Id.*

addition, the Producer Groups contend the remand order also failed to identify specific certificates, facilities, and services to be rescinded.

Sea Robin has made no request for abandonment authorization with respect to any certificated portion of its system and should not be required to do so. Sea Robin does not seek to abandon any facilities or services in these proceedings. Sea Robin proposes no transfer of facilities to another entity nor does it intend to cease operating them. Further, Sea Robin does not seek to abandon, and the Commission has not rescinded, its blanket certificate authority. Sea Robin merely seeks to be able to continue operating previously certificated facilities as gathering facilities, exempt from the Commission's NGA jurisdiction, based on their current function. As in other cases where the current owner would continue to own and operate the facilities and the only issue was the jurisdictional status of the facilities,[41] the order on remand made its jurisdictional determination based on objective physical characteristics relevant to the facilities' primary function; it was not required to be supported by a finding of public interest.

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[41] The Commission has frequently rescinded certificates of public convenience and necessity based on a jurisdictional finding that the facilities and services authorized under certificates were exempt gathering or other non-jurisdictional facilities not subject to the Commission's NGA authority. *Amerada Hess Corporation et al.*, 52 FERC ¶ 61,268, at p. 62,027 and p. 62,030 (1990); *Gasdel Pipeline System, Inc.*, 86 FERC ¶ 61,251, at p. 61,908 (1999); *CNG Transmission Corp.*, 82 FERC ¶ 61,262, at p. 62,032 (1998); *Garden Banks Gas Pipeline, LLC*, 78 FERC ¶ 61,066, at p. 61,243 (1997) (vacating certificate orders, not pregranting abandonment authority, is appropriate Commission course if jurisdictional facilities found to be gathering); *Greeley Gas Company*, 75 FERC ¶ 61,015, at p. 61,053 (1996) (service area determination under NGA Section 7(f) resulting in vacating 7(c) certificate); *Pacific Offshore Pipeline Company*, 64 FERC ¶ 61,167, at p. 62,510 (1993); and *Pelican Interstate Gas System*, 61 FERC ¶ 61,025, at p. 61,129 (1992).

E. *Sea Robin's Interconnection with Garden Banks*

As noted above, the Indicated Producers' rehearing request introduced into the official record of this proceeding for the first time a fact that has not been considered either by the Commission or by the Court in the context of this case. Specifically, that Garden Banks, a certificated interstate pipeline, has interconnected with the east-leg of Sea Robin's system in South Marsh Block 128.[42] Garden Banks delivers gas into Sea Robin's system at their interconnection on the east leg of Sea Robin's inverted-Y system. The interconnection is approximately 100 miles upstream of Sea Robin's Vermillion 149 Compressor Station, which the Commission's order on remand found to be the demarcation point between Sea Robin's gathering and transmission functions.

In this proceeding, the Commission has thoroughly analyzed Sea Robin's pipeline system. In response to the Court's remand order, the Commission reviewed all its prior findings and made modifications to its jurisdictional determination. The Commission is not persuaded to disturb its earlier ruling in this long fought case solely on the basis of Sea Robin's current upstream interconnection with Garden Banks. Specifically, the Commission does not agree that the fact of Sea Robin's upstream interconnection with Garden Banks, by itself, compels a finding that the east leg of Sea Robin's system is jurisdictional. First, the *Tarpon* case, cited by the

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[42] The Garden Banks system is designed to provide capacity to transport towards shore gas produced in deep-water areas. The mainline of the Garden Banks system is a 50-mile, 30-inch diameter natural gas pipeline extending from a production platform in Garden Banks Block 128, offshore Louisiana to the Shell Gas Pipeline Company Platform in South Marsh Block 76, offshore Louisiana. The interconnection with Sea Robin's system is a 16-inch subsea tie-in located on the Garden Banks mainline, approximately 30 miles downstream of Garden Banks Block 128. The Banks system was declared to be a jurisdictional interstate transmission system in *Shell Gas Pipeline Company*, 74 FERC ¶ 61,277 (1996) and was placed into service on April 16, 1997.

Producer Groups,[43] predates the Court's remand order in *Sea Robin*, which precludes us from giving controlling weight to a single physical factor in applying the primary function test. Even in *Tarpon*, the presence of upstream facilities was not the only factor considered by the Commission. The Commission considered it "equally important" in that case to resolve the jurisdictional issue in a manner consistent with "the NGA and the procompetitive goals of the NGPA." In *Tarpon*, the Commission was concerned that a "disclaimer of jurisdiction in this case would subject producers and shippers to a potential monopolistic situation which would be inconsistent with those goals."[44] Regardless of whether it would be appropriate to give similar weight to nonphysical considerations following *Sea Robin*, such concerns are no longer present in this case for the reasons discussed below.[45]

In affirming the non-jurisdictional status of Sea Robin's upstream east and west legs, the Commission has considered the Producer Groups' concerns regarding the potential for unfettered exercise of monopoly power in the OCS. However, the Commission believes those concerns have been overtaken by the two significant events that have occurred since the Commission determined that Garden Banks' interconnecting upstream facilities are jurisdictional under the NGA. First, the Court's decision in *Sea Robin* was issued, providing guidance in applying the primary function test to offshore facilities, guidance the Commission followed in reformulating its primary function test in its order on remand. Second, the Commission has established regulations under the OCSLA to enable it to ensure that gas is transported offshore on an open

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[43] Note 14, *supra*.

[44] *Tarpon*, 60 FERC ¶ 61,041, at p. 61,150.

[45] The presence of jurisdictional upstream facilities may have greater significance onshore where the protections of the OCSLA do not apply.

and nondiscriminatory basis. This new rule makes the regulatory distinction between NGA-jurisdictional and NGA-exempt facilities less significant on the OCS.

Now that the Commission has instituted a regulatory regime under the OCSLA, applicable to all OCS facilities, to monitor compliance with competitive principles, the significance of a determination that an OCS facility is not subject to the NGA is diminished. Absent the new OCSLA regulatory scheme, the Commission would share the Producer Groups' concern that the reformulated primary function test in the order on remand could result in some OCS service providers being able to use their natural monopoly positions to exercise their market power over essential OCS facilities in a discriminatory manner, contrary to express Congressional intent regarding gathering operations on the OCS.

However, as discussed above, the new OCSLA regulations will require all OCS service providers—both NGA-exempt and NGA-jurisdictional pipelines—to file the information needed by the Commission to determine whether OCS service providers are conforming with the open access and nondiscrimination mandates of the OCSLA. This information will be available to shippers that believe they are being subjected to anticompetitive practices. A shipper will be able to use information in its OCS service provider's reports to support an allegation of anticompetitive treatment, enabling the shipper to bring its concerns to the Commission in a timely fashion. Thus, implementation of the new OCSLA reporting requirements will make the Commission better able to ensure that the integrated OCS natural gas transportation network will adhere to the OCSLA's open and nondiscriminatory access provisions, including with respect to rates, and the Commission will be less dependant on the NGA to prevent market power abuses.

The Commission orders:

The requests for rehearing of the order on remand are denied.

Commissioner Hébert dissented with a separate statement attached.

Curt L. HÉBERT, Jr., Commissioner, *dissenting*:

I continue to dissent for the reasons stated in my prior dissent issued June 30, 1999.[1]

[1] *Sea Robin Pipeline Company*, 87 FERC ¶ 61,384 (1999).

APPENDIX D

COMMISSION OPINIONS, ORDERS AND NOTICES

Docket Nos. CP95-168-002 and -000

SEA ROBIN PIPELINE COMPANY

Order on Remand

Issued June 30, 1999

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

This proceeding involves the petition by Sea Robin Pipeline Company (Sea Robin) to have its offshore natural gas pipeline system declared to be a non-jurisdictional gathering facility. On October 23, 1997, the United States Court of Appeals for the Fifth Circuit vacated and remanded the Commission's June 16, 1995 decision[1] that determined under the Commission's "primary function" test, Sea Robin's pipeline facilities are properly classified as jurisdictional transportation facilities, rather than nonjurisdictional gathering facilities as Sea Robin proposed.[2] On February 2, 1998,

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[1] *Sea Robin Pipeline Company*, 71 FERC ¶ 61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996).

[2] *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998). The Commission's basic test for determining the jurisdictional status of a pipeline facility is the "primary function" test. The "primary function" test was articulated by the Commission in *Farmland Industries, Inc.* (*Farmland*), 23 FERC ¶ 61,063 (1983). In Farmland, the Commission enumerated six physical criteria to be included in a jurisdictional analysis: 1) the length and diameter of the

the court denied the Commission's petition for rehearing and motion for clarification. The case is now before the Commission on remand from the Fifth Circuit for further consideration.

In its decision, the court ruled that the Commission failed to give adequate attention to the physical or operational characteristics of Sea Robin's system in applying the "primary function" test to determine its jurisdictional status.[3] The Court concluded that the Commission had decided that Sea Robin performed a transportation function solely on the basis of the single factor of the size and length of the system and had disregarded the rest of the factors of the primary function test.

The court stated that on remand, the Commission may again consider the applicability of the primary function test to offshore pipeline systems and, if necessary, reformulate the test.[4] The Court suggested that the Commission may choose to generically delete any of the *Farmland* criteria that the Commission believes to be nonprobative with respect to assessing the function of Outer Continental Shelf (OCS) facilities.[5]

The court offered no judgement as to the proper result. However, the Court did offer for the Commission's consideration an approach to classifying Sea Robin's facilities which would draw the jurisdictional line between gathering

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line; 2) the extension of the facility beyond the central point in the field; 3) the line's geographic configuration; 4) the location of compressors and processing plants; 5) the location of wells along all or part of the facility, and 6) the operating pressure of the lines. Over time, certain nonphysical criteria, such as the general business activity of the operator, were also utilized by the Commission.

[3] *Id.* at 369.

[4] *Id.* at 372.

[5] *Id.*

and transportation at a point internal to Sea Robin's overall system.[6] The Commission has reviewed its method of applying the primary function test offshore and has decided to follow the Court's suggested approach.[7] In addition, the Commission is reformulating certain aspects of its application of the primary function test to OCS facilities in light of the Fifth Circuit's decision.

The Commission's review has resulted in our concluding that the "behind-the-plant" factor is not necessarily determininative when the primary function test is applied to offshore facilities, and can be outweighed by other factors. In addition, the Commission will assess the physical configuration of offshore pipeline systems to determine if there exists a central location where gas is aggregated for further transportation to shore. The Commission will view such a location as being the offshore analogue of the onshore "central-point-in-the-field" criterion. Specifically, in cases in which a pipeline system is configured to deliver gas collected from upstream wells to a centralized location through several relatively small diameter lines for aggregation for further delivery onshore through a single larger diameter pipeline, that centralized aggregation location will be considered to be analogous to the central-point-in-the-field in the onshore context and will be given weight in identifying the

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[6] *Id.* at 371.

[7] The Commission notes that a determination that gathering ends at a point internal to Sea Robin's system is not a new concept. On June 25, 1996, Sea Robin filed a letter with the Commission's Secretary urging the Commission to find on rehearing of the June 16, 1995 declaratory order that "at a minimum Sea Robin's facilities at the upstream of the Vermillion platform . . . be declared to be non-jurisdictional gathering facilities under the NGA." After suggesting that Sea Robin may choose to "offer portions of its system as predominantly involved in a gathering or a transportation function," the Fifth Circuit pointed out that the Commission, without prejudice, declined to address Sea Robin's request because the request was not part of the original petition. 127 F 3d at 371.

demarcation point between gathering and transportation on OCS pipeline systems.

Taking the approach suggested by the Court and applying the primary function test as refined herein to Sea Robin's system, the Commission has determined that gathering on Sea Robin's facilities ends at a point internal to Sea Robin's existing certificated pipeline system at the Vermilion Block 149 Compressor Station.

I. The Primary Function Test

A. *Statutory Framework*

The basic purpose of Congress in enacting the NGA was to "occupy the field,"[8] of the regulation of natural gas moving in interstate commerce by the primary grant of jurisdiction to the Commission over those aspects of such regulation over which the states may not act.[9] Section 1(b) of the NGA embodies the primary grant of jurisdiction to the Commission. At the same time, Section 1(b) exempts from the Act's coverage "the production or gathering of natural gas." Thus, Section 1(b) first grants to the Commission broad plenary authority to regulate the business of transporting and of wholesaling natural gas moving in interstate commerce. Secondly, Section 1(b), by operation of the "production and gathering" exemption, removes from that plenary grant of federal jurisdiction those aspects of natural gas regulation which are the proper subject of state regulation.

However, the NGA does not define "production" or "gathering" and the Commission over the years has developed criteria by which it determines how facilities should be classified under these categories. Significantly, the NGA was enacted in 1938 at a time when there was no federal OCS and

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[8] *See Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 310-311 (1988).

[9] *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

no OCS natural gas facilities. As a result, the Commission's policy regarding the jurisdictional status of production and gathering facilities had its initial evolution primarily in the context of onshore production and gathering.

Only in the last decade or so, has the Commission attempted to apply the primary function test[10] to determine the jurisdictional status of OCS facilities. Because of the physical characteristics particular to OCS facilities, application of several of the factors used in the primary function test onshore has been difficult to apply in the OCS environment. Wells are drilled and operated from production platforms offshore. Large platforms can accommodate up to 36 wells. Although gas may be treated, cost and engineering considerations generally preclude any processing of gas on offshore platforms for the extraction of liquefiable hydrocarbons. In short, the nature of OCS production and the movement of gas from the platform to consumers onshore does not make for a tight fit with the weight afforded the criteria historically applied by the Commission to onshore production and gathering. Accordingly, over the past decade the Commission has modified the application of the primary function test in a fashion that leads to results for OCS facilities that are functionally equivalent to the results obtained onshore. In this order, the Commission, under the guidance of the Court, is further refining its adaptation of the primary function test to the offshore environment.

B. *Evolution of the Application of the Primary Function Test to OCS Pipeline Facilities*

In 1989, in *EP Operating v. FERC* (*EP*),[11] the court reversed a Commission determination that a 51-mile long, 16-inch diameter OCS pipeline was a jurisdictional transportation facility. The 51-mile pipeline originated at a point over

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[10] *See* note 2, *supra*.

[11] 876 F. 2d 46 (Fifth Cir. 1989).

80 miles offshore at a floating production platform located in water depths of 1649 feet. Paramount among the factors the Commission had found to be indicative of transportation were the length, diameter, and operating pressure of the facility. The court found the length of the line in *EP* was solely a function of location, being "no more than the distance between the point of production and the nearest appropriate connection with an interstate pipeline."[12] In addition, the Court was persuaded by EP's assertion that no jurisdictional pipeline was willing to build a line out to the EP floating rig 80 miles from shore in 1,640 feet of water. Accordingly, the court found that the primary function of the EP line is gathering because "the . . . [EP line] is simply the most practical way to move the product from the seabed to a point nearer shore where it can be processed and introduced into a pipeline."[13] Commenting on the primary function test, the court noted that the test "involves a case-by-case consideration of all the facts and circumstances of the particular case rather than the application of any overarching bright line standards."[14]

In response to the *EP* decision, in 1989 the Commission set upon a review of its "gathering policy." This review culminated in the Commission's articulation and application of the "modified primary function" test in *Amerada Hess Corporation, et. al., (Amerada Hess)*.[15] As set out in *Amerada Hess*, the "modified primary function" test consists of the continued application of the "primary function" test as

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[12] *Id.* at 49.

[13] The court noted that while initially the EP line would be used only to transport gas produced and owned by the joint owners of the line, the line had significant excess capacity. The court stated that its decision "does not predict the effect that such changes in use might have on the primary function of the facility." *Id.* at 50.

[14] *Id.* At 48.

[15] 52 FERC ¶ 61,268 (1990).

articulated in *Farmland* with a modification in its application in accord with *EP*. Specifically, when applying the *Farmland* criteria, the Commission stated that it would consider, especially for offshore facilities, the changing technical and geographic nature of exploration and production. The order explained that because of recent advances in engineering and available technology, offshore drilling operations were moving further offshore and further from existing interstate pipeline interconnections. Accordingly, in applying the "modified primary function" test to OCS pipeline facilities the Commission stated that it would apply, in effect, a sliding scale that would allow for the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area.

From the adoption of the "modified primary function" test in 1990, until the Commission's 1995 decision in *Sea Robin Gas Pipeline Company (Sea Robin)*, the Commission had found only two OCS facilities were not exempt gathering facilities under the test.[16] The Commission's policy in applying the "modified primary function" test to offshore facilities resulted in finding, in virtually every case, that *all* offshore pipeline facilities that carry natural gas from well connections to offshore platforms, between offshore platforms, or away from offshore platforms to an interconnection with an interstate pipeline are non-jurisdictional gathering facilities. During this period, OCS pipeline facilities of increasing lengths and diameters, including existing interstate pipelines, as well as facilities in relatively shallow waters, were declared to be non-jurisdictional gathering facilities.

In 1995, in response to heightened interest in OCS exploration and development, the Commission through a notice of

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[16] *Tarpon*, 60 FERC ¶ 61,041 (1992); *Trunkline Gas Pipeline Company*, 67 FERC ¶ 61,256 (1994).

inquiry undertook a review of its OCS gathering policy. On February 28, 1996, the Commission issued a statement of policy respecting pipeline facilities on the OCS. [17] The policy statement concluded that facilities located in deep water (a depth of 200 meters or more) would be presumed to be gathering facilities up to the point where they reach proximity to, or the point or points of interconnection with, the existing interstate pipeline grid. Beyond that point, the facilities' primary function would be determined under the Commission's existing "primary function" test.

C. *Changes to the Existing OCS Primary Function Test*

As noted by the Fifth Circuit, where gas is destined for interstate commerce, there is necessarily a point at which the collection or gathering of gas ends, and interstate transmission begins.[18] Prior to the adoption of the primary function test which incorporated several earlier methodologies, the Commission had promulgated two principal "tests" to differentiate onshore facilities engaged in transportation, subject to the Commission's NGA jurisdiction, from facilities engaged in gathering, which are exempt from NGA regulation. The first test, the "behind-the-plant" test, was announced in *Phillips Petroleum Co.*[19] The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are nonjurisdictional gathering lines. All facilities located beyond the processing plant are presumptively transportation facilities. [20] At the time that

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[17] Docket No. RM96-5-000, *Statement of Policy*, 74 FERC ¶ 61,222 (1996).

[18] 127 F. 3d at 371.

[19] 10 FPC 246 (1951), *rev'd in part on other grounds sub nom. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

[20] The concept that transportation begins only after processing comported with the Commission's then definition of the entities that Congress intended to be subject to regulation under the NGA, *i.e.*, "companies

it was developed, the "behind-the-plant" test was for the most part used where the gathering pipeline and processing facility were both owned by the gas seller, with the sale of the gas occurring after processing. The Commission was able to adequately protect consumer interests through its jurisdiction over the sale. [21]

For gas that requires no processing, the "central-point-in-the-field" test was applied. Under the "central-point-in-the-field" test, a mechanical determination is made whether gas from separate wells is collected by several lines which converge at a single location in the producing field for delivery into a single line, the separate lateral lines behind the central point being classified as non-jurisdictional gathering facilities.[22] The "central-point-in-the field" is often the point where the gas is compressed by the pipeline.

In the onshore context, the "behind-the-plant" and "central-point-in-the-field" concepts have been incorporated into the "primary function" test.

The Commission believes that offshore the "behind-the-plant" factor is not necessarily determinative and can be outweighed by other factors. In the onshore context, for economic reasons, the location of gas processing plants generally coincides with a centralized location so that at the point where the collected and processed gas leaves the

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whose main function was to transport natural gas through interstate pipelines and sell gas so transported at city gates for resale to ultimate consumers." *Columbian Fuel Corp.*, 2 FPC 200, 207 (1940). Because the Commission at that time did not believe it was required to regulate producer resales and since unprocessed gas is difficult to transport in long high pressure lines and cannot be sold at the city-gate for consumption, the processing plant was a logical effectuation of the gathering/ transportation function.

[21] *See, e.g., Buckeye-Tennessee Gas Gathering Co.*, 12 FERC ¶ 61,208 (1980).

[22] *See Barnes Transportation, Inc.*, 18 FPC 369, 372 (1957).

processing plant, all of the physical acts of production and gathering have been completed. Offshore, this coincidence of plant tailgate and centralized location in the field does not occur. Production-related economic, operational, and engineering factors preclude completion of gas processing close to the producing areas as occurs onshore. Cost, engineering and technological considerations limit the amount of production processing equipment that can be near OCS producing fields. These production-related factors dictate that only the most rudimentary separation and dehydration operations to prevent formation of water-hydrocarbon hydrates and permit efficient flow of the wellhead stream be conducted at sea. Accordingly, in assessing the jurisdictional status of offshore facilities, the "behind-the-plant" factor will not be afforded greater significance than the other factors of the primary function test.

In addition, where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation on OCS systems. The Commission recognizes that not all OCS pipeline systems will exhibit a centralized aggregation point. For example, an OCS facility that has a straight-line or spine-and-lateral type configuration may not have such a point. The Commission will determine the jurisdictional status of such systems on the basis of the current formulation of the primary function test as modified in this order, as well as any additional refinements that the Commission may develop to further adapt the primary function test to the physical characteristics of moving natural gas across the OCS to shore.

II. Sea Robin's System Facilities

Sea Robin was formed as a joint venture owned by subsidiaries of United Gas Pipe Line Company (United) and

Southern Natural Gas Company (Southern) and operated by United.[23] Sea Robin was certificated in 1969[24] to transport gas in interstate commerce from the OCS for its then-affiliates, United and Southern. The system's initial purpose was to obtain gas supplies from production fields in the East Cameron, South Marsh Island, and Eugene Island areas of the Gulf of Mexico, and deliver them to United and Southern. United and Southern were Sea Robin's only sales customers. Subsequently, however, deliveries to United and Southern declined and Sea Robin abandoned its sales obligations to United and Southern and became a transportation-only pipeline on April 1, 1990.[25] Sea Robin's shippers today consist of producers and marketers which transport gas to Erath, Louisiana, or the Henry Hub in Louisiana for ultimate delivery to markets on interconnecting transmission pipeline systems.

Sea Robin's system and the production connected to it are located on the OCS in the Gulf of Mexico. The system consists of 438 miles of dual-phase pipelines and six compressors, all of which were constructed and have been operated pursuant to certificates of public convenience and necessity.[26] Sea Robin moves a raw stream of natural gas and

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[23] On December 13, 1990, Southern Offshore Pipeline Company, a subsidiary of Southern, purchased United's interest in Sea Robin. Presently Southern Deepwater Pipeline Company and Southern Offshore Pipeline Company each own 50 percent of Sea Robin, an unincorporated joint venture, and both of these companies are wholly owned subsidiaries of Southern.

[24] 41 FPC 237 (1969).

[25] Sea Robin became an open-access transporter under the provisions of Order No. 436, and on October 21, 1988, the Commission issued to Sea Robin its open-access blanket certificate. Sea Robin filed a revised tariff with the Commission in compliance with the provisions of Order No. 636 on December 31, 1992, in Docket No. RS92-79 and implemented operations under Order No. 636 on November 1, 1993.

[26] In 1969, when Sea Robin's original certificate was issued in Docket No. CP69-48, the Commission certificated a variety of pipelines with

liquid hydrocarbons, also referred to as condensate, which has not been separated or processed. Sea Robin collects this gas and liquid stream from numerous production fields offshore and carries the raw stream to shore for liquids separation, dehydration, processing, and delivery to five interconnecting transmission pipelines.[27] The system can carry in excess of 288 Bcf annually.

The system is configured in the form of an inverted or upside-down "Y." The size of the pipes constituting the system ranges from 4-inch diameter pipeline to 36-inch diameter pipeline. However, more than 77 percent of the system is composed of 20-inch and larger diameter pipeline.[28]

Sea Robin's system contains ninety-nine miles of 4-inch to 16-inch diameter laterals connecting 57 receipt points to the system. Generally, the receipt points are located on offshore

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diameters ranging from 8.625 inches to 36 inches. *Sea Robin*, 41 FPC 257 (1969). These facilities were considered necessary to construct an integrated interstate pipeline system capable of accessing and transporting OCS gas from multiple production areas. As Sea Robin's system grew to a capacity of 1.26 Bcf/day, the Commission certificated a variety of additional OCS facilities as part of Sea Robin's integrated system. New facilities were certificated to extend Sea Robin's transportation system with 10.75-inch, 12.75-inch, 20-inch, and 24-inch pipelines, [47 FPC 1486 (1972)], to expand its transportation system with 12.75-inch laterals at the same time expanding its 20-inch, 24-inch and 30-inch mainlines [58 FPC 898 (1977)], to loop its system with 30-inch pipeline to provide for additional deliverability [51 FPC 1221 (1974)], or simply to connect to producer platforms with 8.625-inch and 12-inch pipeline to permit "the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission" [42 FPC 929 (1969)].

[27] Columbia Gulf Transmission Company, Koch Gateway Pipeline Company, Sabine Pipeline Company, Southern Natural Gas Company, and Louisiana Resources Company (an intrastate pipeline).

[28] 40.7 miles of 20-inch diameter line; 106 miles of 24-inch diameter line; 23.1 miles of 26-inch diameter line; 102.9 miles of 30-inch diameter line; and 66.3 miles of 36-inch diameter line.

production platforms which provide for the interconnection of the production facilities to Sea Robin's system.[29] In addition to the 57 production platform receipt points, there are two Sea Robin-owned receipt points and laterals connected to Sting-ray Pipeline Company in West Cameron Blocks 563 and 586.

The longest segment of the system is the Vermilion 149-Erath segment, consisting of 66.3 miles of 36-inch pipeline running in a straight line from the Vermilion 149 compressor station, a manned platform, to onshore processing facilities. Through this segment, Sea Robin carries gas that has been moved by Sea Robin from 67 platforms and brought together, through the arms of the inverted "Y" configuration to the Vermilion 149 station at the fork of the "Y." The Vermilion 149 Station consists of two turbine compressor units of 12,350 horsepower each.[30] From the Vermilion 149 Station the gas is then carried in a straight line, 66.3 miles to shore, through a region where the Vermilion 149-Erath line picks up additional gas from four platforms, all of which are located along the first 25 miles of the 66.3 mile-long segment. The Vermilion-Erath line terminates at an onshore location near Erath, Louisiana, in Vermilion Parish, where the gas that has been carried through Sea Robin's system is delivered to two plants for separation, dehydration, and processing. Sea Robin does not have an ownership interest in either plant. The first

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[29] In instances where the interconnection between the production facilities and Sea Robin's facilities is not located on the platform then, generally, the interconnection is located at a subsea tap where Sea Robin's facilities and a third party's facilities intersect. These third party facilities consist of very short laterals which are primarily owned by producers; however, a few of these laterals upstream of Sea Robin's system are owned by interstate pipeline companies.

[30] At the time of the Commission's prior orders in this proceeding the Vermilion 149 Station housed three 12,500 hp compressors. On February 1, 1999, the Commission granted Sea Robin's request for authorization to abandon one of these compressors. *See* 86 FERC ¶ 61,093 (1999).

plant, a treatment facility, is operated by Pennzoil Petroleum Company. The second plant, a processing facility, is operated by Texaco Exploration and Production, Inc.

After leaving the plants, the gas travels approximately 1.8 miles downstream to Sea Robin's Erath Compressor Station (Erath Station). The compression at Erath is stated to be necessary because the pipeline's pressure is too low after reaching shore and moving through the processing plants to enter the transmission pipeline systems.

Sea Robin delivers gas on behalf of the various shippers on its system to four interstate pipeline companies at five interconnecting delivery points onshore. Four of the delivery points are located at the terminus of the Sea Robin system on the Erath Station site. However, the Sabine delivery point is located immediately upstream of the Erath Station. Gas delivered at the Sabine Delivery Point typically goes to the Henry Hub which is less than one mile from the processing plants and the Erath Station.

III. Discussion

When all the relevant circumstances relating to an offshore pipeline system are considered, the conclusion may be that a portion of the facilities of the system is engaged in gathering, while another portion is engaged in jurisdictional transportation.[31] After reconsidering the totality of the circumstances of Sea Robin's system in light of the Fifth Circuit's opinion, the Commission believes that Sea Robin is primarily engaged in jurisdictional transportation over the portion of its system described by Sea Robin as its "longest segment."[32] That longest segment is the Vermilion 149-Erath Line, consisting of 66.3 miles of 36-inch pipeline running in a

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[31] 127 F 3d at 371; *Panhandle Eastern Pipe Line Company*, 52 FERC ¶ 61,268, at pp. 62,012-13 (1990).

[32] Petition at 15.

straight line from the Vermilion 149 Compressor Station to the onshore. Through that large diameter segment, Sea Robin transports gas that has previously been taken by Sea Robin from 67 platforms and then brought together, through the arms of Sea Robin's inverted "Y" configuration, to the Vermilion 149 Station, located at the fork of the "Y."

From the centralized collection point, the gas is transported in a straight line, 66 miles to shore, through a region with few platforms. Although the entire Vermilion-Erath Line is located upstream of the processing plants, that fact, taken alone, is not determinative in assessing the primary function of a major OCS line like Sea Robin. Due to the geographic and technical characteristics of production and transportation on the OCS, it is not feasible to construct a major processing plant closer to the production areas.

In addition to the marked change in physical attributes and geographic configuration exhibited by Sea Robin's facilities occurring at Vermilion Block 149, the straight-shot geographical configuration of Sea Robin's system downstream of the Vermilion 149 Station interconnecting with only two laterals delivering gas from only four wells along its 66.3-mile length, in and of itself, is a further indication of a transportation function.

Another element of the primary function analysis indicative of the transmission function of the Vermilion 149 to Erath Line is the location and concentration of significant compression at Vermilion 149. At the Vermilion 149 Station, the gas can be compressed by two 12,500 hp compressors for further transportation. Sea Robin's Vermilion Block 149 compression is typical of compression found on large diameter transportation lines transporting high volumes of gas over relatively long distances. This compression is not field compression and is not needed to deliver gas from OCS production platforms into Sea Robin's system. Rather, these compressors stand ready to assist in transporting large

volumes of gas relatively long distances from that centralized collection point, through a large diameter pipeline in a straight line, over 66 miles to shore, through a region with few platforms. Sea Robin explains that compression at the Vermilion 149 Station may be needed "because of the physics of transporting large volumes of gas, along with condensate, through a dual-phase pipeline system for substantial distances." Sea Robin's explanation of the purpose of the Vermilion 149 Station further demonstrates that the Vermilion to Erath Line is engaged primarily in transportation. The location of compressors often serves as an indicator of transportation because, as on Sea Robin's system, compression is usually required to transport large volumes of gas over substantial distances. Sea Robin points out that offshore gathering frequently occurs at high pressures "since gas on the OCS is produced at high pressures." That point is true but irrelevant when compression is added at a central point in order to make possible further transportation "for substantial distances." The location of the two compressors at the Vermilion 149 Station is an additional factor indicating that transportation is the primary function of Sea Robin's facilities downstream of that point.

Moreover, aside from the fact that the overall configuration of Sea Robin's system exhibits a clear demarcation point between the collection and transmission functions, the Commission can not ignore the physical dimensions of the Vermilion 149 to Erath Line. While the court in *Sea Robin* viewed the Commission's prior orders to be based primarily on the size of Sea Robin's facilities, the court did not rule that the length and diameter are not relevant in determining the jurisdictional status of an OCS pipeline facility. The 36-inch diameter and 66.3 mile-length of the Vermilion 149 to Erath Line are dimensions typically associated with a transmission function and in this case are factors which, when considered with the other factors are indicative of a transmission

function, *i.e.*, geographical configuration, concentration and purpose of compression, presence of a centralized aggregation location, the abrupt change in physical characteristics at the Vermilion 149 Compressor Station, and the paucity of well connections along the 66.3 mile run through relatively shallow OCS waters, have caused the Commission to conclude that the primary function of the Vermilion 149 Compressor Station and the Vermilion 149 to Erath Line are jurisdictional facilities under the NGA.

In sum, the Vermilion 149 Station, a platform where Sea Robin performs compression and delivers the gas into the Vermilion-Erath line, is a central aggregation point that demarcates the end of the gas collection process on Sea Robin's system. Upstream of the Vermilion 149 Station, along the two arms of Sea Robin's inverted "Y," there are 45 laterals of diameters ranging between 4.5-inches and 24-inches that are connected to 67 production platforms. By the time the gas has reached the Vermilion 149 Station, the collection process has been virtually completed. Gas from only four platforms enters the Sea Robin system downstream of the Vermilion 149 Station. The introduction of gas from only a few producing locations downstream of the centralized collection point at Vermilion 149 does not change the primary function of the Vermilion to Erath Line, which is predominantly that of transportation.[33]

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[33] The Commission has historically acknowledged that because in a given case the production and gathering process may be "indivisible," a facility may perform more than one function. *See Continental Oil Company*, 16 FPC 1 at 7 (1956). In such circumstances, the Commission has found the law to be clear, *i.e.*, "where by an affirmative grant of power the statute gives the Commission jurisdiction over particular facilities, the fact that those facilities may also perform some function exempted from Commission power by another provision of the act does not suffice to remove the facilities from Commission control." *Id.* at 8. With this premise in mind, the Commission designed the "primary function" test to take account of the possible dual-role that a gas facility may play in the

In its petition, Sea Robin argues that the "central-point-in-the-field" test is of only "limited" relevance for offshore facilities. In fact, the central aggregation location configuration we have identified herein is significant for a facility like Sea Robin's that brings gas from many platforms to a single central point where it is aggregated and compressed for further transportation to shore through a single, longer and larger diameter line. In some offshore cases, the Commission has found the central-point-in-the-field to be of limited importance "with regard to isolated OCS operations" because the "central point" is the production platform and "production platforms are unitary structures." [34] However, those cases have little significance when gas has been brought from many such platforms to a central aggregation point for compression and further transportation.

Sea Robin also tries to minimize the significance of the central point in its configuration by arguing that there is no "true" central point when the system is configured like an inverted "Y." For that proposition, Sea Robin relies primarily on the Commission's decision in *Pelican Interstate Pipeline Co., (Pelican)*[35] In *Pelican,* however, the gas "entered the system at various locations along its entire length,[36] and

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production and gathering process. As the Commission stated in the seminal case where the "primary function" test was first articulated, "the consideration of decisive importance, in our view, is whether the company is engaged predominately in the transportation of gas in interstate commerce, as compared to other functions it may carry out." *Ben Bolt Gathering Company*, 26 FPC 825 at 827 (1961). In short, it is not necessary to find that the function of a particular facility is exclusively transportation or gathering to make a jurisdictional determination. Rather, the test is a determination of the *primary* function of the facility.

[34] *Superior Offshore Pipeline Company (SOPCO)*, 67 FERC ¶ 61,253, at p. 61,835 (1994).

[35] 61 FERC ¶ 61,025 (1992).

[36] *Id.* at p. 61,128 (1992).

Pelican provided no compression. There was thus no central point where the gas collection ended and transportation began.[37]

At bottom, the fundamental purpose of the sum of all of the factors that have been applied under the rubric of the "primary function" test is not to show how long a pipeline segment is, or to designate a name for a generalized type of physical configuration, or to count compressors, *etc.* "Although a variety of labels have been applied to these factors, *the ultimate test* is whether the primary function of the facility can be classified as transportation or gathering."[38] Thus, in determining whether the NGA Section 1(b) gathering exemption applies, "the Commission must make a factual determination whether a [facility's] primary function consists of the interstate transportation of gas or some other activity." If the purpose of the facility can be categorized as being primarily the collection of gas, its principal or primary function is gathering. If, on the other hand, the principal or primary function of the facility is to move gas away from the location where the collection process is completed, its

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[37] Similarly, in *SOPCO*, *supra* at p. 61,836 and *Green Canyon Pipe Line Company*, 59 FERC ¶ 61,109, at p. 61,411 (1992), there was no central point to which gas was collected for compression by the pipeline. Indeed, in *SOPCO*, the pipeline did not provide compression at all and was operated at natural wellhead pressure. In Green Canyon, the "Y"-shaped system "consisted of four lines which connected several OCS production platforms, and formed a network feeding into Transco's gathering system." The Green Canyon system was a "network configuration" (59 FERC at p. 61,411) located behind Transco's gathering lines. In *SOPCO*, the two arms of the "Y" connected at the onshore processing plant, and wells were "located throughout the producing areas where SOPCO gathers gas" (67 FERC at p. 61,835).

[38] *Farmland Industries*, 23 FERC at p. 61,143. *See also, EP, supra.* "The true test of primary function is whether, with reference to the specific facts and circumstances of this particular line, its primary function is gathering." 876 F.2d at 49.

primary function is transportation. In the case of Sea Robin's system, the application of this fundamental concept leads us to the conclusion that Sea Robin's pipeline facilities comprise two distinct components: a collection, or gathering component, upstream of the Vermilion 149 Platform, and a transportation component downstream of that point. In the most fundamental meaning of the "primary function" test, the "totality of the circumstances" demonstrates that the primary function of the Vermilion-Erath Line is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point where the gas is aggregated and compressed.

The Commission orders:

(A) The petition for declaratory order filed by Sea Robin in Docket No. CP95-168-000 is granted in part and denied in part.

(B) The certificates of public convenience and necessity issued to Sea Robin are rescinded to the extent necessary to reflect the jurisdictional findings discussed in the body of this order.

(C) Within 30 days from the date of issuance of this order, Sea Robin shall file tariff sheets specifying separately stated gathering rates, not inconsistent with the terms and conditions of its Part 284 tariff provisions, for gathering services performed through facilities located upstream of the Vermilion 149 compressor station.

Commissioners Bailey and Hébert dissented with separate statements attached.

Vicky A. BAILEY, Commissioner, *dissenting*.

I respectfully dissent from today's decision. I would now grant Sea Robin's petition and find its offshore facilities to be a non-jurisdictional gathering system. My conclusion reflects the evolution of my own thinking subsequent to both the issuance of the Commission's OCS Policy Statement in 1996 and our earlier decisions in this Sea Robin proceeding. (See my dissenting statement in *Shell Gas Pipeline Company*, 78 FERC ¶ 61,192 (1997).

I respect the effort made in this order to reformulate the application of the primary function test to OCS facilities. But each new case will present distinquising [sic] fact patterns, and the Commission will continue to be faced with the dilemma of which aspects of the primary function test should be given greater weight. In the end, I fear that we will continue to have a mixed group of gathering and transmission lines on the OCS, and that the jurisdictional status of certain of those lines will be based solely upon different applications of the primary function test. My experience when we decided the earlier Sea Robin case convinces me that, no matter how great an effort we make, any jurisdictional decision we issue in this area is subject to challenge because it is easy to find conflicting Commission precedent.

I remain convinced that the movement of gas across the OCS is often a collection process. Without a statutory definition of gathering, I find the analysis set forth in *EP Operating Company v. FERC*, 876 F.2d 46 (Fifth Cir. 1989) to be controlling. Deeper water production will mean even longer and wider lines to move the production to market, but that does not change the function away from gathering to transmission. I recognize that the preservation of FERC/NGA jurisdiction affords protections in the face of potential complaints, but, as the Sea Robin court observed: 'Need for regulation cannot alone create authority to regulate.'

As noted in my *Shell* dissent, the antidiscrimination provisions of the Outer Continental Shelf Lands Act (OCSLA) are real. This Commission has acknowledged its jurisdiction pursuant to that statute and would respond promptly to complaints. Ultimately, if an unduly discriminatory rate is found to be without remedy under the OSCLA, a legislative solution would be a viable option if that need were demonstrated.

In sum, I am not persuaded that today's order provides a workable approach to OCS jurisdictional determinations. I believe, as a practical matter, that the movement of most gas across the OCS is primarily a gathering function.

Curt HÉBERT, Jr., Commissioner, *dissenting*.

This proceeding began in 1995 when the Sea Robin Pipeline Company (Sea Robin) filed a petition with the Commission for a declaratory order seeking a finding that its pipeline facilities were gathering facilities exempt from the Commission's Natural Gas Act (NGA) jurisdiction under Section 1(b) of the Act. The subsequent denial of the underlying petition and request for rehearing led to an appeal to the United States Court of Appeals for the Fifth Circuit. The order on remand is the majority's response to the Circuit Court's decision to vacate the previous Commission orders on this issue and remand the case to the Commission for further consideration.

The Circuit Court's remand seems to be largely centered on the Court's finding that "the Commission abandoned, without reasoned consideration, its 'sliding scale' of *Amerada Hess* . . . " and "Instead, the Commission reverted to its single factor, bright-line approaches that it had previously rejected as unworkable for offshore pipelines. *See Northwest Pipeline Corp.*, (noting that a reasoned analysis of the primary function test must eschew the application of any overarching bright line standards); *EP Operating Co.*" (citations omitted).[1]

In addition to the Court's concern that the Commission had not supplied a reasoned decisions for its departure from previous decisions on matters regarding the outer continental shelf, the Court indicated that perhaps certain elements of the primary function test were not appropriately applied to this petition, or that certain elements might no longer be "relevant to the physical, geographical and operational characteristics

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[1] *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, at 370 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998).

of pipelines in the OCS"[2] and that the primary function test should be reformulated to address the unique challenges presented by facilities on the offshore.

On remand, the majority appears to take advantage of the opportunity to reformulate the primary function test stating that, the Commissions' finding will be based on "reconsidering the totality of the circumstances." and its analysis of physical characteristics of the Sea Robin system.[3] Based on this analysis the Commission finds Sea Robin to be engaged in jurisdictional transportation on the Vermilion 149-Erath Line.

However, while the order on remand asserts that the analysis is based on the "totality of the circumstances," closer inspection reveals that the proposed reformulation gives certain weight to various factors such as the central-point-in-the-field thereby presenting yet another jurisdictional test for this arena.

While the history of this issue predates my participation, I am informed by the impact of the various Commission reformulations of its tests to determine gathering, particularly the impact of the 1996 Policy Statement[4] which elevated the proximity of a line to jurisdictional facilities beyond other elements of the primary function test resulting, realistically, in a one-sided determination in favor of jurisdiction.

After reviewing the history of this issue, and the Commission's evolving responses to the challenges of the OCS issues, I am assured that the precedent of *EP Operating*[5] remains the appropriate legal benchmark for these proceedings. Under the Court's guidance in *EP Operating* there

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[2] *Id.* at 371.

[3] Mimeo at p. 12.

[4] Docket No. RM96-5-000, *Statement of Policy*, 74 FERC ¶ 61,222 (1996).

[5] *EP Operating Co. v. FERC*, 876 F.2d 46 (Fifth Cir. 1989).

is a recognition that "[t]he true test of primary function is whether, with reference to the specific facts and circumstances of this particular line, its primary function is gathering."[6] This test is seen then within the reflection of the fact that due to the very nature of gas production on the OCS, facts such as the length of the line "is no more that the distance between the point of production and the nearest appropriate connection with an interstate pipeline."[7] I find this statement to comport with my belief that the longer lengths, larger diameters and higher operating pressures typical of offshore pipelines need to be recognized in a primary function analysis.

In the Commission Notice of Inquiry on Alternative Methods for Regulating Natural Gas Pipeline Facilities and Services on the Outer Continental Shelf,[8] the Commission asked for assistance in responding to the court's direction in *Sea Robin*, and the Commission specifically asked how it could simplify the process of making OCS jurisdictional determinations. I do not view the use of the *EP Operating* holding as a simplification, but as guidance that is clearer than the various reformulations of the modified primary function test which fail to provide any clear guidance on this issue. Unfortunately, the majority's action on the remand does not provide the OCS issue with the clarity and simplicity that the Commission indicated it was looking for when it issued the 1998 Notice of Inquiry. Instead, I believe that the actions today add another level of complexity and uncertainty to an already complicated arena.

Accordingly, my preference would be to utilize the *EP Operating* precedent as the most appropriate approach to a jurisdictional determination of this system.

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[6] *Id.* at 49.

[7] *Id.* at 49.

[8] 83 FERC ¶ 61,235 (1998).